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The decision of the Massachusetts Supreme Court in the late case of Hanson v. Globe Newspaper Co., reported in full on page 196 of this issue, may be good law. We doubt it very much, however. We express this opinion notwithstanding that we have made no especial examination of the subject or the precedents by which it is claimed to be supported. But we have no faith in it because it seems to us to be the merest nonsense, and we have been taught to believe that law has in it at least some of the elements of human reason. In the case mentioned the defendant published in its newspaper an article describing the conduct of a prisoner brought before the municipal court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston." He was in fact a real estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson, instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. It was held by the court that the plaintiff could not recover, for the reason, that while his name was used in the article there was no intention to refer to him, and that in order to prove the libel it was not sufficient to show that plaintiff's name was used in the article, but it must be further shown that he was the person whom the article was intended to describe. It seems to us that the statement of this decision should be sufficient to condemn it. A newspaper publishes a libel about a certain party, identifying him thoroughly by name, occupation and surroundings. It then seeks to avoid the consequences of the injury done by the defense that the publication had in mind another party entirely. The tort is complete. The wrongful act in the false publication has been perpetrated. The damage to defendant's reputation followed; for the public, or all except the few who may have been in court on the day in question, or who consult the criminal records, have no way of telling who was the prisoner except by what is stated in the article. And yet the defendant may escape liability for his wrongful act upon the plea of want of intention. Such plea, in our judgment, does not constitute any defense when the inevitable consequence of the defendant's act is that the public, or that part of it which knows the plaintiff, will suppose that the defendant did use its language about him. We are pleased to observe that three of the members of the court refused to give their sanction to so unjust and unreasonable view of the law.

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Some years ago the United States Supreme Court was called upon to decide whether a photograph is the subject of copyright. In Lithographic Co. v. Sarony, which involved the right of defendant to copyright a photograph of Oscar Wilde, that court decided that congress can authorize copyright of photographs so far as they embody original intellectual conceptions of the author, and that where a photographer so contrives the pose, costume and expression of his subject as to produce an original and graceful effect, the picture is entitled to the benefit of the act providing for copyright of photographs. In Falk v. Donaldson, lately decided by the United States Circuit Court for the District of New York, the question again arose in reference to a photograph of Miss Marlowe, made by the complainant. The defendant denied that the photograph represented any original or intellectual conception of the complainant. The court, however, thought differently. A comparison with the Sarony case was convincing to the court that what Sarony did the complainant did. In the Sarony case it was not found that the photographist originated the costume or the character. But the photograph was Sarony's mental conception of the character produced, as in the present case, by the use of light and shades and various accessories. On these grounds, and because a useful, new, harmonious, characteristic picture was the result, the court held plaintiff to be the author thereof. In view of the Sarony case, and of the case of Nottage v. Jackson, 11 C. B. 627, which was cited approvingly in the Sarony case, and also

in view of the recent decision of Falk v. Gast L. & E. Co., 48 Fed. Rep. 264, it was established to the satisfaction of the court "that in the present case the complainant was the author of an original work of art, the product of his intellectual invention."

NOTES OF RECENT DECISIONS.

CHATTEL MORTGAGE — ALTERATION — INSERTION BY MORTGAGEE OF EXCESSIVE AMOUNT. —In Green v. Snead, the Supreme Court of Alabama decide that where a mortgagor and mortgagee agree that the latter may insert in the mortgage the true aggregate amount of several specified items, the respective amounts of which are fixed, but not known to them at the time, and the latter inserts a greater amount than such aggregate, such mortgage is void, though the mortgagee acts in good faith. McClellan, J., says:

The general proposition that any material alteration of an instrument, after its execution, without the maker's consent, avoids it, and discharges him from all obligations depending upon it, is not controverted in this case. Montgomery v. Crossthwait, 90 Ala. 553; 8 South. Rep. 498; Anderson v. Bellenger, 87 Ala. 334, 6 South. Rep. 82. Nor can it be doubted in principle or upon authority that a material, and, as between the original parties to the instrument, vitiating, alteration may consist in the filling of a blank, which the promisee is authorized to fill in a certain way, by the insertion therein of matter not covered by the authorization. 1 Amer. & Eng. Enc. Law, p. 518; Toomer v. Rutland, 57 Ala. 379. And as any change of the amount intended to be evidenced by a writing, whereby it becomes nominally a promise to pay either a greater or less sum than that originally expressed is a material, and therefore vitiating, alteration (1 Amer. & Eng, Enc. Law, p. 508), so, in principle, where the amount is left blank, and the promisee is authorized to insert a given sum, or the true aggregate of several specified items, the respective amounts of which are fixed, but not at the time known to the parties, and he inserts a different amount, as here, in excess of the true aggregate of all the items intended to be embraced, the like vitiating consequences must ensue. The court below confined the application of these principles to cases in which the alteration is made with a fraudulent intent, and, finding no such intent to have actuated the plaintiff in this instance, held that the mortgage was a valid security for the amount really due, notwithstanding a different and excessive amount had been inserted in it. The distinction is not well taken. The question of intent is not involved. As is well said by counsel: "The motive with which the change is made, or the unauthorized filling of the blank is done, is not material. It is not because the thing done is actual fraud, but because a contrary rule would open too great a door for fraud;" and because, we may add, that the alteration changes the legal identity of the paper, and causes it to speak a language differing in legal effect from that which it originally spoke,—a result which would ensue however pure the intent with which the alteration was made, that the law holds the instrument, as between the original parties and those nominally acquiring rights under it with notice of the alteration, to be null and void for all purposes. 1 Amer. & Eng. Enc. Law, pp. 518, 520; Glover v. Robbins, 49 Ala. 219; Toomer v. Rutland, 57 Ala. 379; Montgomery v. Crossthwait, 90 Ala. 573, 8 South. Rep. 498. Where the alteration or unauthorized filling of blanks is free from all covinous intent, the result of an honest mistake or miscalculation, it may be that the promisee can recover on the original consideration. He certainly could not do even this if he made or consented to the change for any fraudulent purpose. 1 Amer. & Eng. Enc. Law, p. 526; White v. Hass, 32 Ala. 430. But here the action is not on the original consideration for which the mortgage was executed but the right of recovery—the title asserted by the plaintiff in this action of detinue—depends upon the validity of the paper itself, which in legal contemplation ceased to be the instrument which the defendant executed the moment it was altered as shown by the uncontroverted evidence; and its emasculation is none the less complete because of the absence of evil intent on the part of the plaintiff in committing the act which destroyed it.

CRIMINAL TRIAL—DUTY OF PROSECUTOR TO CALL ALL WITNESSES.—One of the questions considered in State v. McGahey, decided by the Supreme Court of North Dakota, is of especial interest, the authorities thereon being somewhat in conflict. The question was whether it is the duty of a prosecutor in a criminal case to call and examine all eye-witnesses to the occurrence. The court held that it was not his duty so to do where the testimony of the witnesses called, or some of them, is direct and positive and apparently covers the entire transaction. The court says upon the subject:

The testimony of the State developed the fact that Mrs. Hill was present at the rink when the shooting occurred, and might have been an eye-witness of the affray, or at least a portion of it. When the State rested, the plaintiff in error requested the prosecuting attorney to produce Mrs. Hill, and have her sworn as a witness for the State. This the prosecutor declined to do, whereupon counsel for plaintiff in error moved the court to order that Mrs. Hill be so produced and sworn. The motion was denied, and this ruling is assigned for error. It is proper to state that besides the witness Hill not less than six other persons had been sworn for the prosecution, all of whom based their testimony upon the sense of sight or hearing, or both, and the testimony thus produced covered all parts of the transaction. Under this assignment of error it is urged that it was the duty of the prosecutor to produce and swear all persons who were shown by the evidence to have been present at the time of the affray, and whose testimony could throw any light upon the subject that would in any degree aid the jury in ascertaining the facts. The rule thus invoked was early established in England. In Reg v. Holden, 8 Car. & P. 606, Patterson, J., said: "Every witness who was present at a transaction of this sort ought to

be called, and, even if they gave different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions as to the truth of the matter." This was a homicide case. And see Reg v. Chapman, *Id.* 559; Reg v. Bull, 9 Car. & P. 22; Rosc. Crim. Ev. 128. While this rule was established in that country at a time when the right of persons accused of crime to be represented by counsel was denied, or greatly abridged, and hence the rule found greater support in justice and necessity than at present, yet we are not aware that it has ever been abrogated. The State of Michigan seems to have adopted this rule in its entirety. It is true that the cases in that State which first discussed the question (Maher v. People, 10 Mich. 212; Hurd v. People, 25 Mich. 405; Wellar v. People, 30 Mich. 16; and Thomas v. People, 39 Mich. 309) announced the modified rule hereinafter stated, but the latest and strongest utterance of that very able court on the subject is found in People v. Deitz, 86 Mich. 419, 49 N. W. Rep. 296. This was a case of assault with intent to do great bodily harm. There were four persons engaged in the affray,—two on each side. The prosecutor called the two on one side, and the testimony covered the entire transaction. The court refused to require the prosecution to swear the other party to the affray, not on trial, and who was present in court, and also refused to require the prosecution to produce and swear three ladies who witnessed the difficulty from the porch of a house 35 rods distant, and who were sworn on the preliminary examination. The case was reversed, and the court said: "We think the better rule is that it is incumbent upon the prosecutor not only to have the witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he chooses. It affords the defense an opportunity to cross-examine without prejudicing their case by the bias of the witness, if he should have any." And see People v. Gordon, 40 Mich. 716; People v. Etter, 81 Mich. 570, 45 N. W. Rep. 1109. But see, also, comments of Cooley, C. J., in Bonker v. People, 37 Mich. 4. We do not think State v. Magoon, 50 Vt. 338, cited by counsel, sustains his position; and Donaldson v. Com., 95 Pa. St. 21, also cited, is not an authority. The case was rape, and was reversed upon another ground, but the court said: "We cannot forbear, however, remarking that, in our opinion, the physician who, the day after the occurrence, examined the person of the girl upon whom the offense was alleged to have been committed, should have been called as a witness, and required to testify by the district attorney. Whether his evidence tended to acquit or convict, it was demanded equally by the cause of humanity on the one side and of justice on the other. We say this more especially because there was no direct evidence of the *factum* of the crime, and no proof of actual penetration, the prosecutrix having testified that she was insensible, and had no knowledge of what took place. We do not reverse for this reason, and do not sustain the fifth assignment of error, which raises the question, but merely express our opinion as to what should have been done in the peculiar circumstances of this case." In the case in 10 Mich., Judge Christiancy said: "Whenever it appears evident to the court that but part of the facts or a single fact, has been designedly selected by the prosecution from the series constituting the *res gestæ*, or entire transaction, and that the evidence of the others is within the power of the prosecutor, it would, I think, be the duty of the court to require the prosecutor to show the transaction as a whole." And in Hurd v. People, *supra*, the same learned judge, again speaking for the court, said: "But the prosecution can never in a criminal case properly claim a conviction upon evidence which expressly or by implication show but part of the *res gestæ* or whole transaction, if it appeared that evidence of the rest of the transaction is obtainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and throw upon him the burden of proving his innocence." In Territory v. Hanna, 5 Mont. 248, 5 Pac. Rep. 252, it is said: "The authorities are clear and conclusive upon the proposition that the prosecution cannot select out part of a transaction, and ask a conviction thereon, when testimony showing the whole thereof is within its reach." Thompson v. State, 30 Tex. App. 325, 17 S. W. Rep. 448, was a homicide case, where the shooting was admitted, and self-defense relied upon, by defendant. It was admitted that there were four eye-witnesses o the shooting, all of whom had been subpœnaed by the State, and were present in the court room. The State introduced only circumstantial evidence and the testimony of experts, and the court refused to require the prosecutor to introduce any of the eye-witnesses. This was held error, on the broad ground that the evidence introduced was not the best evidence of which the case was susceptible, and revealed the existence of more original sources of information, as stated in 1 Greenl. Ev. § 82. The modified rule applied in these cases commends itself so instantaneously to the judicial mind that it would probably be accepted by any court in the land. But the facts and circumstances of this case leave it clearly outside the influence of this rule. Here not less than seven witnesses had testified directly to facts as they saw them and heard them. There had been no particular facts selected out by design or otherwise. The entire transaction had been sifted in all its details. There is not even a suggestion of concealment in the evidence. Nor is it suggested that Mrs. Hill was in better condition to know the facts than any one of several witnesses whom the State called. The most that can be claimed is that Mrs. Hill, testifying upon the same matters, and with the same means of knowledge, might have contradicted the testimony of the other witnesses. Under such circumstances, no duty rested upon the State to call her. The law is ever more zealous to protect innocence than to punish crime. Persons accused of crime have the full and free use of the process of the court to compel the attendance of witnesses. They are always represented by counsel, chosen either by themselves or by the court. They can be convicted only upon evidence that the jury regards as practically conclusive, and so juries are always instructed. We regard it as clearly unsafe to go further, and require the prosecution, after it has fairly and in good faith given the entire *res gestæ* to the jury, to call every witness to the transaction, howsoever bitterly hostile such witness may be to the prosecution, or howsoever powerful his motives may be to screen the defendant. To place such a witness in the hands of astute counsel for cross-examination would be to confound justice, and establish a rule that innocence never requires for its protection. This assignment of error cannot be sustained on this ground. State v. Middleham, 62 Iowa, 150, 17 N. W. Rep. 446; State v. Eaton, 75 Mo. 586; State v. Johnson, 76 Mo. 121; State v. Martin, 2 Ired. 101; State v. Smallwood, 75 N. C. 106; State v. Cain, 20 W. Va. 679; Com. v. Haskell, 140 Mass. 128, 2 N. E. Rep. 773.

MUNICIPAL CORPORATION—DEFECTIVE SIDEWALK—INJURY TO TRAVELER — KNOWLEDGE OF DEFECT.—If a person with full and present knowledge of the defective condition of a sidewalk and of the risks incident to its use, voluntarily attempts to travel upon it when the defect could easily and without appreciable inconvenience have been avoided by going around it, he is not in the exercise of reasonable care, but must be presumed to have taken his chances. In such case if injury results he cannot recover from the city. This is the doctrine affirmed by the Supreme Court of Indiana, in Wright v. City of St. Cloud, 55 N. W. Rep. 819. Mitchell, J., says:

Except in Michigan, where it is held that the liability of municipalities for defective streets is purely statutory, and where the same statute applies alike to cities and rural townships, the general, if not universal doctrine, is that the duty of a city to exercise reasonable care to keep its sidewalks in safe condition for travel is not limited to structural defects, but extends also to dangerous accumulations of ice and snow. This is implied, if not decided, in Henkes v. City of Minneapolis, 42 Minn. 530, 44 N. W. Rep. 1026. In this climate and in this new State, the duty of cities with respect to ice and snow must necessarily be somewhat limited, and care should be taken that they be not held to a degree of diligence beyond what is reasonable, in view of their situation. What reasonable care might require in a milder climate or in an older country, where cities are more compactly built, might be too high a standard in this climate, for new cities, often embracing within their limits much territory that is more rural than urban. All that is required is reasonable care under all the circumstances, and, in determining whether a defect is actionable, consideration must be had, not only to the danger to be apprehended from it, but also to the practicability of remedying it. No inflexible rule can be laid down as to the condition in which reasonable care requires a city to keep its streets and sidewalks, with respect to ice and snow. This must depend, in a measure, on climate, amount of travel, means at command for making repairs, and other varying circumstances. But conceding, what we think the evidence tends to show, that the city was negligent, we think it also appears clearly that the plaintiff herself was lacking in ordinary care. We have held, in common with every other court, that the mere fact that a person attempts to travel a highway after notice that it is out of repair is not necessarily negligence; that this depends on circumstances. Erd v. City of St. Paul, 22 Minn. 443; Estelle v. Village of Lake Crystal, 27 Minn. 243, 6 N. W. Rep. 775; Kelly v. Railway Co., 28 Minn. 98, 9 N. W. Rep. 588; McKenzie v. City of Northfield, 30 Minn. 456, 16 N. W. Rep. 264; Nichols v. Minneapolis, 33 Minn. 430, 23 N. W. Rep. 868. But none of these cases were altogether analogous in their facts to the present one. In all of them it will be found either that the traveler had no other practicable road, and had either to pass over the defective way, or abandon his journey, or that, although aware that the road or walk was out of repair, he had no knowledge of the existence of the particular defect which caused the injury, or that the accident occurred in the dark, and that the traveler, although having previous knowledge of the situation, had not presently in mind the existence of the defect, or the consequent risk. But in the present case, while plaintiff might not have known of the existence or location of any particular hollow or hole in this path, it is very clear from her own testimony that she had full and present knowledge of the precise condition of this part of the sidewalk, and of the risk incident to traveling over it. The only risk was that of slipping and falling, and that was perfectly patent to any one of ordinary intelligence. She simply overestimated her own ability to travel across it without falling. There was no necessity of her going over the defect, but she could have easily and without appreciable inconvenience, have avoided it by going across to the other side of the street, where the walk was perfectly safe. Under such circumstances she was not in the exercise of reasonable care, but must be presumed to have taken her chances, and having done so, and an injury having resulted, she cannot recover from the city. No different rule as to contributory negligence, or assumption of risks, whichever it is called, is to be applied from that which would be applied to any other case; and, if the plaintiff had exercised half as much care for her own safety as she exacts from the city for the safety of travelers, the accident would never have occurred. Wilson v. City of Charleston, 8 Allen, 137; Schaefler v. Sandusky, 33 Ohio St. 246; Horton v. Inhabitants of Ipswich, 12 Cush. 488; City of Quincy v. Barker, 81 Ill. 300. Judgment reversed.

INSTALLMENT SALES.

As already intimated in a previous article (37 CENTRAL LAW JOURNAL, 125), the real object and purpose of the parties to an installment sale, is to provide the seller with simple yet effective security for deferred installments of purchase money, and, at the same time, invest the buyer with the free, unrestricted enjoyment and use of the property thus transferred. But in giving effect to that intention, the courts of the several States have shown a wide diversity of opinion.

In many instances it is difficult to harmonize the decisions of a single State, and wholly impossible to reconcile the decisions of the several States. More than five hundred cases have been adjudicated and reported within the past thirty years. So far as those decisions are at all susceptible of classification, they will be found to range under one or the other of two different governing principles, namely: First, whatever legal title a person owns, that he may lawfully convey—but more than that he can under no circumstances convey. Secondly, the person who voluntarily invests another with actual possession and ap-

parent ownership becomes privy to a constructive fraud upon the entire business public, and must suffer the consequences.

Cases of the first kind apply, with the utmost strictness, the familiar maxim, *caveat emptor;* those of the second apply the equally familiar maxim that, whenever one of two equally innocent persons must sustain loss, he shall suffer through whose act or omission such loss became possible. For example, in Sumner v. Wood,[1] plaintiff had bargained and delivered a sewing machine, taking certain promissory notes, each of which stipulated that title was reserved unless payment was made at maturity, etc.; such payment was not made, but, on the contrary, the machine was transferred, and, by mesne transfers, reached the hands of the defendant who, in detinue for the property, showed that he had bought the same from a prior holder, and actually paid therefor its full value. The court say: "When there is a condition precedent attached to a sale, title will not pass until that condition is performed or waived. But the great mark of ownership of personal property is possession; and when a contract is made by which it is understood that the title shall be apparently in one, when it is in fact in another, the world has a right to suppose that the one in possession is the owner; and such a contract cannot be set up, to the prejudice of *bona fide* creditors and purchasers, without notice. Such contracts are out of the usual course of business, unnecessary, and directly tend to the injury of those who are not in the secret." But on a second appeal of this case, its doctrine of *bona fide* creditors and purchasers was repudiated and squarely overruled.[2]

On the occasion of this second appeal the court say: "We consider it settled, by the overwhelming preponderance of decisions, that, where there is an express stipulation in the sale of personal property that such property shall not be the vendee's until the price is paid, the title does not pass—the transaction being a mere conditional sale; and that a *bona fide* purchaser of such property acquires only the conditional title of his vendor, and cannot be protected against recovery in a suit brought by the original vendor and owner of the legal title. The fact that the first purchaser (or second vendor) was, at the time of sale, in possession of the property, does not change the principle. It is a question of right, not of notice, and the maxim, *caveat emptor*, applies with as much force as in ordinary bailments."

From thence, hitherto, the doctrine of this overruling case has continued unshaken in the State of Alabama. On the other hand, where D sold a safe to W, on a written contract, by which it was to remain D's property until paid for, the contract was not recorded; the property was seized by W's creditors, and D brought replevin, the court say: "No record was made of this agreement and, so far as shown, the arrangement was unknown to all except the contracting parties. This secret contract, as between the parties, was good, but was void as to creditors. A party who, by his own acts, places another in the ostensible position of owner, should be estopped to deny such ownership. Private transactions of this kind are not favored, and are opposed to public policy. This property being in possession of W as owner was, under the authorities, subject to his debts."[3] Again, where G bought a threshing machine of V, agreeing to give his notes and a chattel mortgage therefor, but obtained actual possession of the machine without doing either, and while the property was in G's possession it was seized by his execution creditors, and V brought replevin, the court say: "Where one sells goods to another and delivers them to the purchaser, although it is agreed the purchaser shall give security, a sale by such purchaser to another without notice will pass the title to the latter, and he will hold the goods as against the first vendor. The first vendor, having trusted his vendee, by making sale and delivery to him, and having put it in his power to defraud others by a sale to them, an innocent purchaser of the property, for a valuable consideration and without notice, ought to be protected. And *bona fide* creditors who, under judgment and execution, acquire a lien on property thus situated, occupy the same position, in all respects, as does a *bona fide* creditor."[4]

While anything like an exhaustive collation of authorities is wholly impossible within the limits assigned to a Journal article, yet a

[1] 52 Ala. 94.
[2] Sumner v. Woods, 67 Ala. 139.
[3] Weber v. Diebold (Colo.), 29 Pac. Rep. 747.
[4] Van Duzer v. Allen, 90 Ill. 499.

half score of cases, taken from as many different States, and representing as many different branches of human industry, may assist the curious reader in arriving at some correct notions as to the trend of judicial thought at the present day throughout the Union. Thus, in Piedmont Land and Improvement Company v. Thomson-Houston Motor Company (Ala.),[5] one K had ordered electrical apparatus and supplies from the makers, a Massachusetts corporation; and in making his order filled out and used an "order blank" supplied by the company; upon the back of this blank were certain printed conditions, and among them one reserving title until full payment, etc.; K took actual possession of the goods, but, instead of paying for them, sold and delivered them to a third person, from whom the maker replevied. The court held that the contract being partly written and partly printed, and there being no contradiction between the two parts, and no proof of fraud or imposition upon K, he is presumed to have understood and assented to the entire agreement; also that the transaction was a conditional sale, that K could not transfer title, even to a purchaser in good faith without notice of the maker's equities, and that, as to all purchasers from him, the maxim *caveat emptor* applies.

In Ames v. Richardson,[6] the vendee in an installment sale of mill machinery mortgaged the property, and the mortgage having been made with the original vendor's knowledge, the discussion turns upon the question of what constitutes waiver. In Stokes v. Baalam,[7] one R had cut wood from plaintiff's land, upon an agreement between them that such wood should remain the property of plaintiff until paid for at the rate of one dollar per cord; this wood being seized by execution creditors of R's husband, the court hold that the plaintiff had not merely a lien to the extent of one dollar per cord, but that he was the general owner. In Beach's Appeal,[8] the New York and New England cases are reviewed at some length; and it is held that the vendee's conditional title, as such, may be either sold or mortgaged. In Morton v. Frick Company,[9] it is held that a vendor's failure to record his contract, as required by statute, cannot be taken advantage of by a subsequent purchaser who had actual notice of such vendor's lien. In Standard Implement Company v. Parlin & Orendorff Company (Kan.),[10] which was replevin by the original vendor against his vendee's mortgagee, the court hold that "where goods are sold at a fixed price to be paid thereafter, and delivery is made upon the express condition that, until the price is paid, title is to remain in the vendor, payment is a condition precedent and, until made, the property is not vested in the purchaser." In this case, Van Duzor v. Allen,[11] *supra*, is sharply criticized, and its doctrine expressly repudiated. In Central Trust Company v. Arctic Ice Machine Manufacturing Company,[12] the Maryland Court of Appeals discuss three questions of practical importance: A corporation engaged in making ice mortgaged its entire plant for a quarter of a million; and a very few days after the mortgage was delivered and recorded, increased its capacity by the addition of three ice machine, valued at about $100,000; these machines were bought on credit, and under a contract by which the maker reserved title, etc.; the mortgagor defaulted, and the mortgagee begun foreclosure, whereupon the maker of these ice machines intervened, to assert and protect his vendor's lien, to which the mortgagor responded, and sought to recoup his damages because the machines were not completed and placed in position within the stipulated time, and also because, when finally completed and put in operation, they did not perform the work bargained for. As to what constitutes notice, sufficient to bind the original vendor and protect a subsequent vendee or mortgagee, and as to the true measure of damages, where property bargained for is not delivered within the stipulated time; and also as to the true measure of damages, where machinery bargained for fails to satisfy the warranty, this case will repay careful perusal. In Journey v. Priestly (Miss.),[13] one of two partners in a livery business sold his undivided half interest, and, in part payment, took a note reserving title, etc., putting his vendee into

[5] 12 South. Rep. 768.
[6] 55 Ark. 642.
[7] 13 Cal. 154.
[8] 58 Conn. 464.
[9] 87 Ga. 230.
[10] 33 Pac. Rep. 360.
[11] 90 Ill. 499.
[12] 26 Atl. Rep. 493.
[13] 12 South. Rep. 799.

actual possession; this note was not paid, but instead thereof the maker sold the property to an innocent third person, who paid its full value in cash; the court hold the lien of the original vendor to be paramount to that of the second purchaser; and that such a lien might be enforced by a bill in equity. Kingsland & Douglas Manufacturing Company v. Massey (Miss.),[14] is a somewhat novel instance of a vendor's lien arising merely by legal implication. Defendant bought, on credit, machinery for his mill, representing that there was no incumbrance either on said mill, or on the lot whereon it stood, and also agreeing to secure payment of the purchase money, by giving a mortgage on the entire plant, after such machinery was placed therein, etc.

It transpired, upon investigation, that, as a matter of fact, the plant was already heavily mortgaged; and the court hold that, under these peculiar circumstances, plaintiffs were entitled to enforce their vendor's lien by an equitable action. The recent Tennessee case of Cowan v. Singer Manufacturing Company,[15] clearly exemplifies the importance of a careful examination of, and a rigid compliance with, local statutory requirements. Plaintiff obtained a sewing machine from defendant, and used it two years; during that period she paid small installments, aggregating some $42, which defendant received and called rent; defendant defaulted in further payments, and defendant replevied the machine: the local statute then in force required the property, under such circumstances, to be advertised and sold to the highest bidder at public auction; defendant omitted to advertise and sell, choosing to rely on his theory that the transaction was a mere lease of the machine; plaintiff then sued for the installments she had paid, and recovered the same in full and with interest; the court construed the transaction to be not a lease, but a conditional sale, and would not permit the plaintiff to be charged anything whatever for the use of the machine during the two years she had kept it. The courts of Vermont construe a similar statute as being intended to afford a conditional vendee the same rights of redemption that he would have in the case of the foreclosure of a mortgage given by him; and a similar right to whatever surplus proceeds a public sale might realize.[16] A comparison of Morton v. Frick,[17] *supra*, with Cowan v. Singer Company,[18] *supra*, will illustrate and very strongly emphasize the opposite extremes to which the courts have gone in the construction and enforcement of installment sales. In the Georgia case a vendor, after receiving five-sevenths of the contract price, was allowed to retain the same and also reclaim his goods, and without any compensation whatever to the vendee. In the Tennessee case, a vendee, after using the goods two years, was allowed to reclaim all she had paid, and without any compensation whatever to the vendor.

In Cherry v. Arthur (Wash.),[19] it is held that, as between a conditional vendor and the holder of a mortgage covering the realty, and given to secure an antecedent debt, a planing machine, which is bolted to the mill floor and connected with the motive power merely by a belt and pulley, does not become a part of such realty, and the lien of such vendor is paramount to that of such mortgagee.

In Kimball v. Mellon,[20] it is held that promissory notes, given for the purchase money of goods sold on the installment plan, which stipulate that title is reserved, etc., are negotiable, notwithstanding such stipulation, and a transfer of the notes transfers the security; but a further stipulation to the effect that, upon default in payment, the holder may, at his election, either collect the notes or seize the goods, renders the amount and time of payment uncertain, and destroys the negotiable character of the paper.

In Schreyer v. Lumber Company,[21] four ship loads of lumber, which had been contracted to be shipped to Germany, were burned before leaving the vendor's premises; and the discussion turns upon the question whether or not title had passed, and the property was at the vendee's risk. Lonergan v. Buford[22] is an instance of the constructive delivery of property not susceptible of actual delivery—for example, an immense herd of live stock grazing at large upon the

[14] 13 South. Rep. 269.
[15] 21 S. W. Rep. 663.
[16] Roberts v. Hunt, 61 Vt. 612.
[17] 87 Ga. 230.
[18] 21 S. W. Rep. 663.
[19] 32 Pac. Rep. 744.
[20] 80 Wis. 133.
[21] 54 Fed. 652.
[22] 13 Sup. Ct. 684 (affirming 22 Pac. Rep. 164).

cattle range; the discussion turns upon the effect of paying a final installment of purchase money, where such payment is made under protest; and of the right of a vendee, after making such payment, to take advantage of any defects in the quality or quantity of the goods thus constructively delivered.

GEO. C. WORTH.

LIBEL—INTENT—MISTAKE IN NAME.

HANSON V. GLOBE NEWSPAPER CO.

Supreme Judicial Court of Massachusetts, June 21, 1893.

In an action against a newspaper for libel it appeared that plaintiff was a real-estate and insurance broker of South Boston, and that in an article giving an account of a person who was fined in a police court, the paper described the prisoner as "H. P. Hanson, a real-estate and insurance broker of South Boston," while the name of the prisoner was A. P. H. Hanson, also a real-estate and insurance broker of South Boston, and that the intention was to describe the proper person, and that plaintiff's name was used by mistake. Held, that plaintiff could not recover, for the reason that, while his name was used in the article, there was no intention to refer to him, and that in order to prove the libel it was not sufficient to show that plaintiff's name was used in the article, but it must be further shown that he was the person whom the article was intended to describe. Holmes, Morton, and Barker, JJ., dissenting.

KNOWLTON, J.: The defendant published in its newspaper an article describing the conduct of a prisoner brought before the Municipal Court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston. He was in fact a real estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson, instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. The justice of the superior court, before whom the case was tried without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant of and concerning the plaintiff;" and the only question in this case is whether this finding was erroneous, as a matter of law.

In a suit for libel or slander it is always necessary for the plaintiff to allege and prove that the words were spoken or written of and concerning the plaintiff. In Baldwin v. Hildreth, 14 Gray, 221, the declaration was adjudged bad on demurrer because this allegation was wanting. The rule is reaffirmed, and authorities are cited, in McCallum v. Lambie, 145 Mass. 234, 13 N. E. Rep. 899. The form of declaration prescribed by the practice act, in slander, uses the phrase, "words spoken of the plaintiff," and in libel, "false and malicious libel concerning the plaintiff." Pub. St. ch. 167, § 94. It has often been held that it is a question of fact for the jury whether the words were or were not spoken or written "of and concerning the plaintiff." Van Vechten v. Hopkins, 5 Johns. 211, 221; Gibson v. Williams, 4 Wend. 320; Smart v. Blanchard, 42 N. H. 137; De Armond v. Armstrong, 37 Ind. 35; Goodrich v. Davis, 11 Metc. (Mass.) 473, 480, 481, 484; Miller v. Butler, 6 Cush. 71. The defendant's meaning in regard both to the person to whom the words should be applied, and the imputations against him, is always to be ascertained. In Smart v. Blanchard, *ubi supra*, it is said that "the meaning in this respect [as to the person to whom the libel applies] is undoubtedly a question of fact for the jury." It is also said that when the meaning is ambiguous it is incumbent on the plaintiff "to show that the defendant intended to apply his remarks to the plaintiff." In De Fanu v. Malcomson, 1 H. L. Cas. 637, which was an action for libel, brought by copartners, the lord chancellor assumes that the plaintiffs must prove "that the party writing the libel did intend to allude to them." In Pub. St. ch. 167, § 94, the rule is laid down as applicable, "in actions for written and printed as well as oral slander," that if the meaning is not clear there must be *innuendoes* to make the words intelligible, "in the same sense in which they were spoken." Chenery v. Goodrich, 98 Mass. 224, 229, assumes that it must appear that plaintiff was referred to in the publication; and Young v. Cook, 144 Mass. 38, 10 N. E. Rep. 719, is of similar import. Odgers on Libel and Slander (at page 127), discusses the topic, "Certainty as to the Person Defamed." In Com. v. Kneeland, 20 Pick. 206, 216, Chief Justice Shaw says that in actions of libel and slander it is the general rule that "the language shall be construed in the sense in which the writer or speaker intended it." In Smith v. Ashley, 11 Metc. (Mass.) 367, the necessity of proving the defendant's actual intention in regard to the person referred to was affirmed much more strongly than there is any occasion to affirm it, and perhaps more strongly than we should be prepared to affirm it, in the present case. It was held that the publisher of a newspaper, containing an article which he believed to be a fictitious narrative or mere fancy sketch, was not liable to the plaintiff, although the article was libelous, and was intended by the writer to be applied to the plaintiff. The court said that in such a case the writer alone was responsible. In every action of this kind the fundamental question is, what is the meaning of the author of the alleged libel or slander, conveyed by the words used, interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. In determining the effect of a slander the questions involved are: What is

the thought intended to be expressed? and how much credit should be given to him who expresses it? The essence of the wrong is the expression of what purports to be the knowledge or opinion of him who utters the defamatory words, or of some one else, whose language he repeats. His meaning, to be ascertained in a proper way, is what gives character to his act, and makes it innocent or wrongful. The damages depend chiefly upon the weight which is to be given to his expression of his meaning and all his questions relate back to the ascertainment of his meaning.

In the present case we are concerned only with the meaning of the defendant in regard to the person to whom the language of the published article was to be applied, and the question to be decided is how may his meaning legitimately be ascertained? Obviously, in the first place, from the language used; and, in construing and applying the language, the circumstances under which it was written, and the facts to which it relates, are to be considered, so far as they can readily be ascertained by those who read the words, and who attempt to find out the meaning of the author in regard to the person of whom they were written. It has often been said that the meaning of the language is not necessarily that which it may seem to have to those who read it as strangers, without knowledge of facts and circumstances which give it color and aid in its interpretation, but that which it has when read in the light of events which have relation to the utterance or publication of it. For the purposes of this case it may be assumed, in favor of the plaintiff, that if the language used in a particular case, interpreted in the light of such events and circumstances attending the publication of it as could readily be ascertained by the public, is free from ambiguity in regard to the person referred to, and points clearly to a well known person, it would be held to have been published concerning that person, although the defendant should show that, through some mistake of fact, not easily discoverable by the public, he had designated in his publication a person other than the one whom he intended to designate. It may well be held that where the language, read in connection with all the facts and circumstances which can be used in its interpretation, is free from ambiguity, the defendant will not be permitted to show that through ignorance or mistake he said something, either by way of designating the person, or making assertions about him, different from that which he intended to say; but his true meaning should be ascertained, if it can be, with the aid of such facts and circumstances of the publication as may be easily known by those of the public who wish to discover it. Whether the defendant should ever be permitted to state his undisclosed intention in regard to the person of whom the words are used may be doubtful. If language purporting to be used of only one person would refer equally to either of two different persons of the same name, and if there were nothing to indicate that one was meant, rather than the other, there is good reason for holding that the defendant's testimony in regard to the secret intention might be received, but perhaps such a case is hardly supposable. Odgers, in his book on Libel and Slander (at page 129), says: "So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given of both the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also any statement or declaration made by the defendant as to the person referred to." In Reg. v. Bernard, 43 J. P. 127, when it was uncertain whether the libel referred to the complainant, or not, and when the language was applicable to him, Lord Chief Justice Cockburn held the affidavit of the writer, that he did not mean him, but some one else, to be a sufficient reason for refusing process. In De Armond v. Armstrong, 37 Ind. 35, evidence was received of what the witnesses understood in regard to the person referred to. In Smart v. Blanchard, 42 N. H. 137, it is stated that extrinsic evidence is to be received "to show that the defendant intended to apply his remarks to the plaintiff," when his meaning is doubtful. Goodrick v. Davis, 11 Metc. (Mass.) 473, 480, 481, 484, and Miller v. Butler, 6 Cush. 71, are of similar purport. See, also, Barwell v. Atkins, 1 Man. & G. 807; Knapp v. Fuller, 55 Vt. 311; Com. v. Morgan. 107 Mass. 199, 201.

If the defendant's article had contained anything libelous against A. P. H. Hanson, there can be no doubt that he could have maintained an action against the defendant for this publication. The name used is not conclusive in determining the meaning of the libel in respect to the person referred to. It is but one fact to be considered with other facts upon that subject. Fictitious names are often used in libels, and names similar to that of the person intended, but differing somewhat from it. A. P. H. Hanson could have shown that the description of him by name, residence, and occupation was perfect, except the use of the initials "H. P." instead of "A. P. H.;" that the article referred to an occasion on which he was present, and gave a description of conduct of a prisoner, and of proceedings in court, which was correct in its application to him, and no one else. The internal evidence, when applied to facts well known to the public, would have been ample to show that the language referred to him, and not to the person whose name was used. So, in the present suit, the court had no occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name "H. P. Hanson," was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Han-

son, the finding that they were not published of the plaintiff followed, of necessity. The article was of such a kind that it referred, and could refer to one person only. When that person was ascertained it might appear that the publication, as against him, was or was not libelous; and his rights, if he brought a suit, would depend upon the finding in respect to that. No one else would have a cause of action, even if, by reason of identity of name, with that used in the publication, he might suffer some harm. For illustration, suppose a libel is written concerning a person described as "John Smith, of Springfield." Suppose there are five persons in Springfield of that name. The language refers to but one. When we ascertain, by legitimate evidence, to which one the words are intended to apply, he can maintain an action. The other persons of the same name cannot recover damages for a libel merely because of their misfortune in having a name like that of a person libeled. Or, if the defendant can justify by proving that the words were true, and published without malice, he is not guilty of a libel, even if, written of other persons of the same name, of whose existence, very likely, he was ignorant, the words would be libelous; otherwise, one who has published that which, by its terms, can refer to but one person, and be a libel on him only, might be responsible for half a dozen libels on as many different persons, and one who has justifiably published the truth of a person might be liable to several persons of the same name, of whom the language would be untrue. The law of libel has never been extended, and should not be extended, to include such cases.

Whether there should be a liability founded on negligence in any case where the truth is published of one to whom the words, interpreted in the light of accompanying circumstances, easily ascertainable by those who read them, plainly apply, and when, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person, of whom they would be libelous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. It is ordinarily to be presumed, although it may not always be the fact, that those who are enough interested in a person to be affected by what is said about him will ascertain, if they easily can, whether libelous words, which purport to refer to one of his name, were intended to be applied to him or to some one else.

The question in this case—whether the words were published of and concerning the plaintiff—was one of fact, on all the evidence. Unless it appears that the matters stated in the report would not warrant a finding for the defendant, there must be judgment for him, even if the finding of fact might have been the other way. We are of opinion that the finding was well warranted, and there must be judgment on the finding.

NOTE.—The profession will find it exceedingly difficult to indorse the conclusion of the court in the principal case particularly after reading the very able dissenting opinion of Justice Holmes concurred in by Justices Morton and Barker. They hold that on general principles of tort the private intent of the defendant would not exonerate it. It knew that it was publishing statements purporting to be serious which would be hurtful to a man if applied to him. It knew that it was using, as the subject of those statements, words which purported to designate a particular man and would be understood by its readers to designate one. In fact the words purported to designate and would be understood by its readers to designate the plaintiff. If the defendant had supposed that there was no such person and had intended simply to write an amusing fiction, that would not be a defense; at least unless its belief was justifiable. Without special reason it would have no right to assume that there was no one within the sphere of its influence whom the description answered. The case would be very like firing a gun into the street and when a man falls setting up that no one was known to be there. Com. v. Pierce, 138 Mass. 165. So when the description which points out the plaintiff is supposed by the defendant to point out another man whom in fact it does not describe the defendant is equally liable as when the description is supposed to point out nobody. On the general principles of tort the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it, in the sense in which the public will understand it. Justice Holmes thus states his views of the law and the authorities: "In the famous case where a parson in a sermon repeated out of Fox's Book of Martyrs the story "that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, where as in truth he never was so plagued, and was himself present at at that sermon," and afterwards sued the parson for the slander, Chief Justice Wray instructed the jury "that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty." Greenwood v. Prick, stated in Brook v. Montague, Cro. Jac. 90, 91. See, also, Crawford v. Middleton, 1 Lev. 82, *cd fin.*

But that case is no longer law. Hearne v. Stowell, 12 Adol. & E. 719, 726. The law constantly is tending toward consistency of theory. For a long time it has been held that the malice alleged in an action of libel means no more than it does in other actions of tort. Com. v. York, 9 Metc. (Mass.) 93, 104, 105; Gassett v. Gilbert, 6 Gray, 94, 97; Abrath v. Railway Co., L. R. 11 App. Cas. 247, 253, 254. See Com. v. Pierce, 138 Mass. 165, 175, *et seq.*; White v. Duggan, 140 Mass. 18, 20, 2 N. E. Rep. 110. Indeed, one of the earliest cases to state modern views was a case of libel. Bromage v. Prosser, 4 Barn. & C. 247, 255. Accordingly, it recently was laid down by this court that the liability was the usual liability in tort for the natural consequences of a manifestly injurious act. Burt v. Newspaper Co., 154 Mass. 238, 245, 28 N. E. Rep. 1. A man may be liable civilly, and formerly, at least, by the common law of England, even criminally, for publishing a libel without knowing it (Curtiss v. Mussey, 6 Gray, 261; Com. v. Morgan, 107 Mass. 199; Dunn v. Hall, 1 Ind. 344; Rex v. Walter, 3 Esp. 21; Rex v. Gutch, Moody & M. 433. See, also, Rex v. Cuthell, 27 State

Tr. 642), and, it seems, might be liable civilly for publishing it by mistake, intending to publish another paper (Mayne v. Fletcher, 4 Man. & R. 312, note; Odg. Libel & S. [25th Ed.] 5.) So when, by mistake, the name of the plaintiff's firm was inserted under the head, "First Meetings under the Bankruptcy Act," instead of under "Dissolution of Partnership." Shepheard v. Whitaker, L. R. 10 C. P. 502. So a man will be liable for a slander spoken in jest, if the bystanders reasonably understand it to be a serious charge. Donoghue v. Hayes, Hayes, 265. Of course it does not matter that the defendant did not intend to injure the plaintiff, if that was the manifest tendency of his words. Curtis v. Mussey, 6 Gray, 261, 273; Haire v. Wilson, 9 Barn. & C. 643. And, to prove a publication concerning the plaintiff, it lies upon him "only to show that that construction which they've put upon the paper is such as the generality of readers must take it in, according to the obvious and natural sense of it." Rex v. Clerk, 1 Barnard, 304, 305. See further, Fox v. Broderick, 14 Ir. C. L. 453; Odg. Libel & S (2d Ed.) 155, 269, 435, 638. In Smith v. Ashley, 11 Metc. (Mass.) 367, the jury were instructed that the publisher of a newspaper article written by another, and supposed and still asserted by the defendant to be a fiction, was not liable, if he believed it to be so. Under the circumstances of the case, "believed" meant "reasonably believed." Even so qualified, it is questioned by Mr. Odgers if the ruling would be forwarded to England. Odg. Libel & S. (1st Ed.) 387 (2d Ed.) 638. But it has no application to this case, as here the defendant's agent wrote the article, and there is no evidence that he or the defendant has any reason to believe that "H. P. Hanson" meant any one but the plaintiff.

The foregoing decisions show that slander and libel now, as in the beginning, are governed by the general principles of the law of tort, and if that be so the defendant's ignorance that the words which it published identified the plaintiff is no more an excuse than ignorance of any other fact about which the defendant has been put on inquiry. To hold that a man publishes such words at his peril when they are supposed to describe a different man is hardly a severer application of the law than when they are uttered about a man believed, on the strongest grounds, to be dead, and thus not capable of being the subject of a tort. It has been seen that by the common law of England such a belief would not be an excuse. Hearne v. Stowell, 12 Adol. & E. 719, 726, denying Parson Prick's Case, Cro. Jac. 91.

I feel some difficulty in putting my finger on the precise point of difference between the minority and majority of the court. I understand, however, that a somewhat unwilling assent is yielded to the general views which I have endeavored to justify; and I should gather that the exact issue was to be found in the statement that the article was one describing the conduct of a prisoner brought before the municipal court of Boston, coupled with the latter statement that the language, taken in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name of H. P. Hanson was used by mistake. I have shown why it seems to me that these statements are misleading. I only will add, on this point, that I do not know what the publicly known circumstances are. I think it is a mistake of fact to suppose that the public generally know who was before the municipal criminal court on a given day. I think it a mistake of law to say that because a small part of the public have that knowledge the plaintiff cannot recover for the harm done him in the eyes of the greater part of the public, probably including all his acquaintances, who are ignorant about the matter; and I think it, also, no sufficient answer to say that they might consult the criminal records, and find out that probably there was some error. Blake v. Stevens, 4 Frost. & F. 232, 240. If the case should proceed further on the facts, it might appear that in the view of the plaintiff's character and circumstances his acquaintances would assume that there was a mistake, that the harm to him was merely nominal, and that he had been too hasty in resorting to an action to vindicate himself. But that question is not before us."

CORRESPONDENCE.

MENTAL SUFFERING AS THE BASIS FOR DAMAGES.

To the Editor of The Central Law Journal:

The philosophic reason underlying any rule of law, if precedent is discarded, is often difficult to perceive; and to the student the difficulty is enhanced rather than diminished, by precedent. This is perhaps especially true when "mental suffering" is contemplated as an element of damages.

That the courts, both federal and State, recognize and promulgate the rule, of course no well informed lawyer will deny; but when it is sought to justify the rule with reason a very different question is presented, particularly if applied to the breach of contracts or cases growing out of that character of torts.

It is asserted as a general principle, and the common daily experience in ordinary business life justifies it, that the measure of damages for breach of contract is based on what was contemplated by the parties at the time it was entered into. Each party is seeking to derive some benefit and the contract is but the formal expression of their desires. Should the courts permit recovery beyond the benefit contemplated by the party when he made the contract? If so, are they not supplying something never intended by the parties?

Thus A prepares a telegram for transmission to B reading, "Your father is dying—come at once." This is delivered to the telegraph company together with the fee, and thereupon a contract is entered into between A and the company that the same shall be immediately transmitted and delivered to B.

Between whom is the contract made, and what is in contemplation of the parties at the time? A may not be a relative or otherwise interested in B or his father than as a mutual friend. Has he in the contract contemplated B's probable mental suffering? Has the company through its agent?

The telegram is, through negligence of the company, not delivered and B fails to reach his father's bedside when he is yet alive, or to even arrive in time for the funeral; yet the courts hold B can sue and recover damages for mental suffering in being deprived of those privileges, and the fifty cents paid by his friend is considered an advanced loan that he may recover as actual damages, thus transposing the original contract into one between parties who never entered into it.

Now, based on the same line of reasoning, suppose A had neglected to make any effort at all to acquaint B with his father's condition until the old gentleman was dead and buried, why could not B sue him and recover for his mental suffering after the neglect was

discovered? Of course to put the question seriously would make one ridiculous, but the inquiry is made for the purpose of exposing the fallacy of allowing such damages against the company.

If A was under no lawful obligation to acquaint B with his father's condition neither was the telegraph company except as A's agent. It made no contract with B, and never became liable to him; but it did make a contract with A to rapidly transmit the information which he voluntarily offered, but was not bound to give, and if it breached that contract it was liable to A for whatever damages they both had in mind when the message was offered for transmission. What was that? B's mental suffering?

Suppose instead of telegraphing, A had elected to use the mail and negligent mail agents had never delivered the letter, would the two-cent stamp afford basis for B's claim against the United States for mental suffering? How much would the government allow him?

Mental suffering is intangible—an unknown quantity—which can never be ascertained or gauged by any known standard of money value. Nothing can remove or alleviate it except removal of the cause that produced it, or the wearing of time sufficient to destroy or weaken its memory. It cannot be valued in money because the moment the mind is relieved sufficiently to accept such compensation the suffering no longer exists.

No one willingly suffers sorrow or any other form of mental disturbance, and all the wealth of the world cannot hire such form of suffering in advance. To say that it can be compensated afterwards by pecuniary value is to utter an anachronism as absurd as it is illogical. He who accepts money for his sorrow over the death of his father is but publishing a hypocrisy that deserves decision.

The individual who is capable of the most intense mental suffering would most scornfully resent any offer to pay him for it in money value; and he who would accept a price for it has never endured it.

Of course the same reasoning will not apply to physical suffering and there can be some measure of compensation for that though the price is often exaggerated in the findings of juries, approved by the courts. Prize fighters deliberately endure it "for the money there is in it," and many street mendicants destroy their eye-sight in advance of taking to the hurdy-gurdy.

The loss of an arm or a leg may be compensated by giving the individual a competency and relieving him from labor during the remainder of his life; but can the imagination conceive of any instance where mental suffering can be compensated pecuniarily?

Beaumont, Tex. HAL W. GREER.

RIGHT OF THIRD PARTY TO MAINTAIN ACTION ON CONTRACT FOR HIS BENEFIT.

To the Editor of Central Law Journal.

Your note and extract of the decision of the Supreme Court of Minnesota, denying the right of a third party to maintain an action upon a promise made to another for his benefit (Vol. 47, p. 142), upon the ground that there is no consideration moving from the third party to the promisor, calls to my mind a long line of decisions by the Supreme Court of Indiana upon that subject, holding, of course, that there must be a consideration moving to the one making the promise from the one to whom the promise is made. The party making the promise having received his adequate consideration for the promise, what right has he to shelter under a claim that no consideration moved from the one for whose benefit the promise is made? Having received his consideration from the one to whom he made the promise, he has no farther concern with the question of consideration. He has received what he contracted for, and is estopped from raising that question with the party for whose benefit he promised. The party for whose benefit the promise is made can maintain the action in such a case, in this State. 78 Ind. 213, and a host of decisions cited. 84 Ind. 149; 93 Ind. 561. W. H. BAINBRIDGE.

Lawrenceburg, Ind.

BOOK REVIEWS.

RICE ON CRIMINAL EVIDENCE.

Although this is the third volume of what is known as Rice on Evidence, it seems more fitting and appropriate to designate it as Rice on Criminal Evidence, inasmuch as it treats solely of the general principles of the law of evidence in their application to the trial of criminal cases at common law and under the criminal codes of the several States. The subject is treated under five subdivisions or parts. Part I considers criminal evidence in its general relations to the criminal law. Part II discusses the instrumentalities of evidence, and is an extended presentation of what is frequently regarded by adroit practitioners as the most vexatious phase of the entire subject. Part III exhibits the evidence of the prosecution under the recitals of the indictment, and is an attempt to faithfully portray the rules of evidence that are sanctioned by authority in order to secure the conviction of the accused. Part IV is devoted to defensive evidence, and is expository of those rules that assist in determining the innocence of the defendant. Part V is an attempt to simplify and lucidly state the more intricate problems of evidentiary law, as found in the trial of specific offenses. Within these subdivisions or parts are some sixty-six chapters which comprehensively embrace, and yet in a detailed manner, treat of the many questions of criminal evidence. The work contains nearly a thousand pages, and the author seems to have been diligent in the hunt for, and collection of, authorities. Though the claim is not made that it is a profound or philosophical treatise, it must be conceded that it answers all the purposes of the practitioner. It is practical, exhaustive of the authorities, well written and admirably presented and arranged. We have no hesitation in giving it our indorsement. The mechanical execution of the work is good, though we think it would have been better to have printed the citations in foot-notes instead of the body of the text. It is published by the Lawyers' Co-Operative Publishing Co., Rochester, N. Y.

HUMORS OF THE LAW.

Junior Law Partner—"We must take our head clerk into partnership. He has had half a million dollars bequeathed to him." Senior Partner—"Partnership! Never! We must part with him on good terms and get him as a client."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCOUNT—Partnership Transaction. — In an action for a balance due on an account it was error to allow plaintiff anything for pasturing stock which was owned by himself and defendant as partners. — NODINE v. SHIRLEY, Oreg., 33 Pac. Rep. 379.

2. APPEAL—Notice—Adverse Party.—In a suit to foreclose a mortgage given by a married woman on two tracts of land, the husband, who owned one of the tracts, was made a defendant, together with several subsequent incumbrancers. The wife defaulted, and the court decreed the foreclosure of both tracts, and entered a personal judgment against the husband and wife for any deficiency. The husband and some of the incumbrancers appealed: Held, that the wife was an "adverse party," within the meaning of the Code, upon whom notice of appeal should be served, since she would be injuriously affected by a reversal or modification of the decree, and the fact that she made default does not preclude the necessity of serving notice upon her.—MOODY v. MILLER, Oreg., 33 Pac. Rep. 402.

3. APPEAL—Parties—Costs.—Where the record shows that one of the defendants appeared specially in the court below, and by answer admitted that he owed the money about which the other parties were litigating; that he paid the money into court; and had no notice of appeal from the judgment subsequently rendered—such defendant is not a party in the appellate court, and no judgment can be rendered against him for costs though his name appeared on the papers as a party.—PRICE v. BARNES, Ind., 34 N. E. Rep. 408.

4. BONA FIDE PURCHASERS—Notice. — The fact that a grantee in a deed is described as "trustee" is notice to one who takes title under the deed that the property is or may be held under a trust of some description, and puts him upon inquiry as to the existence and nature of the trust. But held, that in this case the defendant used due diligence in following up the inquiry, and was justified in purchasing upon the faith of the information received. — MERCANTILE NAT. BANK OF CLEVELAND v. PARSONS, Minn., 55 N. W. Rep. 825.

5. CARRIER — Bills of Lading. — Code art. 14, §§ 1, 2, making bills of lading executed in the State, or being executed elsewhere, which shall provide for "the delivery of goods within the State," negotiable instruments, and conclusive in the hands of *bona fide* holders of actual delivery to the carrier, applies only to goods whose final destination is within the State, and not to those delivered by one carrier to another for transshipment merely under a through bill; and this, though neither carrier is responsible under the bill beyond its own line.—LAZARD v. MERCHANTS' & MINERS' TRANSP. CO., Md., 26 Atl. Rep. 897.

6. CARRIERS—Loss of Goods—Petition.—In an action for the loss of goods a petition alleging that the goods had been delivered to defendant railroad company, and were in its custody, by virtue of a contract of shipment, and that while in its custody they were destroyed by fire, is sufficient, without any allegation as to the issuance of a bill of lading. — MARTIN v. FT. WORTH & D. C. RY. CO., Tex., 22 S. W. Rep. 1007.

7. CARRIERS—Passenger—Burden of Proof.—While a railroad company owes a very high degree of care to its passengers, to protect them from injury, yet the company is not an insurer of their safety; and it is error to instruct the jury that if a train in which a passenger was traveling left the track, and was derailed, and the passenger was injured thereby, the company would be liable for such injuries as were the direct and proximate result of such accident, unless the derailment could not have been guarded against by human skill and foresight, and was caused by a defect unknown to the company.—TEXAS & P. RY. CO. v. BUCKELEW, Tex., 22 S. W. Rep. 994.

8. CARRIERS OF PASSENGERS — Street Railway—Injuries.—In an action by a passenger against a street-railway company for personal injuries, a charge that defendant was bound to exercise the highest degree of care, prudence, and caution in operating its cars so as to prevent injury to its passengers is proper, and is not open to the objection that it in effect informed the jury that defendant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to a passenger, though it had used all care possible under the circumstances.—SEARS v. SEATTLE CONSOLIDATED ST. RY. CO., Wash., 33 Pac. Rep. 390.

9. CARRIERS OF PASSENGERS — What Constitutes.—A person who gets on the platform of an express car without having purchased a ticket, and remains thereon, in violation of the company's rules, for the purpose of being carried from one station to another, is not a passenger. The fact that a brakeman of such train, on discovering such person, accepts from the latter the required fare from the station where he got on to his place of destination, does not constitute such person a passenger, since the former cannot waive the rules of the company.—CHICAGO & E. R. CO. v. FIELD, Ind., 34 N. E. Rep. 406.

10. CERTIORARI—Bond—Approval.—Where the county clerk received the bond required to be given on the issuance of a writ of *certiorari* to a justice, filed it, and issued the writ, and the county judge indorsed his approval on the bond, the approval of the bond by the clerk will be presumed, and the writ will not be dismissed for failure of the clerk to indorse such approval, but it should be approved *nunc pro tunc*. — NELMS v. DRAUB, Tex., 22 S. W. Rep. 995.

11. CHATTEL MORTGAGE—Foreclosure—Amendment.—Where the assignee of a chattel mortgage brings an action to foreclose it, and to compel parties in possession of part of the mortgaged property to account for same, he cannot amend his bill by making his assignors parties, and alleging that they procured him to accept

the assignment by fraudulent representations, and praying that it be declared void, and that they be required to refund to him the money paid therefor, since such amendment is variant from and repugnant to the bill.—BAKER V. GRAVES, Ala., 13 South. Rep. 275.

12. CHATTEL MORTGAGE—Possession by Mortgagee—Lien. — Where a creditor, having accepted from his debtor, in good faith to secure an existing indebtedness to him, a chattel mortgage upon a stock of goods, and under the mortgage, which is not recorded, obtains the key of the store containing the stock of goods, and takes actual possession of all of such goods, and while in such possession, invoicing the stock, is found by the sheriff, with writs of attachment in his hands to levy, and thereupon such mortgagee at once informs the sheriff of his possession of the stock of goods under the mortgage, and the sheriff demands of him the possession of the same, and takes from him the key of the store, and then makes a levy on the stock: Held, that the chattel mortgage, with the actual possession of the property obtained thereunder by the mortgagee, is a prior lien to the levies of the sheriff of the attachments of creditors. — HAUSNER V. LEEBRICK, Kan., 33 Pac. Rep. 375.

13. CONSTITUTIONAL LAW—Inspection of Stock—Statute.—St. Okl. ch. 3, art. 1, which provides for the inspection of all stock driven into Beaver county, and requires the inspector to collect specified fees per head from the owner or person in charge, and imposes penalties for failure to comply with certain provisions of the act, the object of which is to assist the settlers in such county in protecting the grass therein against stock owned by non-residents, and to prevent those driving stock through the county from taking stock owned by residents therein, is in conflict with Organic Act Cong. § 6, which provides that the lands or other property of non-residents shall not be taxed higher than the property of residents.—FARRIS V. HENDERSON, Okla., 33 Pac. Rep. 380.

14. CONTRACT—Assignment.—Where a partnership is dissolved and the partners form a corporation, an assignment by the firm to the corporation of all its stock in trade, accounts, and all contracts entered into by the firm for the purchase and delivery of goods, transfers to the corporation a contract for the purchase of goods, not specifically mentioned in the bill of sale. — SHADBOLT & BOYD IRON CO. V. TOPLIFF, Wis., 55 N. W. Rep. 854.

15. CONTRACT—Construction—Joint Building Operations. — Complainant and defendant agree to build houses for sale, the latter to advance the money, and the former to contribute his skill and time as superintendent, each to have half of the profits after sale: Held that, independently of the question whether a partnership existed between the parties, complainant was entitled to maintain an action for an accounting.—BUDD V. SCUDDER, N. J., 26 Atl. Rep. 901.

16. CONTRACT — Gambling Contracts — Dealing in Stocks. — While a broker employed to buy and sell stocks under an agreement that no stock should be actually delivered, but that he should either make bargains to that effect with the other parties to the transactions, or should protect his principal from being called upon to accept or make actual deliveries, is a participator in an illegal contract, and cannot recover money advanced, yet a mere expectation on the part of the principal and broker that purchasers from the principal would be willing to adjust the transactions by paying or receiving differences, when there is no agreement to that effect, does not render the contract illegal.—BARNES V. SMITH, Mass., 34 N. E. Rep. 403.

17. CONTRACT—Parol Evidence. — In an action on a written contract for the sale of goods, which purports to contain the entire agreement between the parties, and to be absolute, evidence of a conversation which tends to show that if on trial the goods were not satisfactory the buyer was not to be liable, is not admissible, since it varies the terms of the written contract.—WILL M. KINNARD CO. V. CUTTER TOWER CO., Mass., 34 N. E. Rep. 460.

18. CONTRACT—Rescission—False Representative.—In an action for the rescission of a contract of exchange of real property on the ground that the defendant falsely and fraudulently pointed out to plaintiff one lot as the land that was to be conveyed to him, while the lot in fact conveyed was an entirely different one, the right of plaintiff to a rescission depends, not upon whether the lot pointed out was worth more than the one actually conveyed, but upon the fact that he did not get the property which it was represented that he was getting. —NELSON V. CARLSON, Minn., 55 N. W. Rep. 821.

19. CONTRACTS — Public Policy.—An agreement between two real estate agents, representing different principals, to divide commissions in case they could effect a sale or exchange between their respective principals, is void as against public policy.—LEVY V. SPENCER, Colo., 33 Pac. Rep. 415.

20. COUNTY JUDGES — Reconstruction Acts.—Under Act Cong. March 2, 1867 (one of the reconstruction acts), providing that when the people of Texas should adopt a constitution containing certain requisites the powers of the military commander should become inoperative, county judges appointed by such commander did not at once lose jurisdiction theretofore exercised, on the adoption of the constitution of 1869, referring such jurisdiction exclusively to district courts, but only after said courts had become fully organized through appropriate legislation, and the military government was at an end.—DANIEL V. HUTCHESON, Tex., 22 S. W. Rep. 933.

21. COUNTY TREASURER—Action of Bond.—Estoppel.—In an action against a county treasurer, and the sureties on his bond, for failure to pay over to his sucessor a balance shown by his official accounts and reports to have been in his hands, the sureties are estopped from showing that the reports and accounts erroneously represented that the treasurer had received certain money, from his predecessor, which he had not in fact received, since the keeping of such accounts, and rendering of such reports, are part of the treasurer's official duties, for the due performance of which his bond is conditioned.—DOLL V. PEOPLE, Ill., 34 N. E. Rep. 413.

22. COUNTY TREASURER — Compensation.—A county treasurer is not entitled to commissions, as for receiving and disbursing money, on the amount of bonds issued by the county, direct to the contractors, in payment for building a bridge.—BAYLOR COUNTY V. TAYLOR, Tex., 22 S. W. Rep. 982.

23. CONVERSION OF COLLATERAL SECURITY—Measure of Damages.—Where a chattel mortgage, pledged as collateral security, is, after foreclosure to satisfy the pledgee's debt, delivered by him to the mortgagor, and destroyed, the mortgagee's measure of damages is the value of the mortgage at the time of such delivery.—NESBITT V. MOORE, S. Car., 17 S. E. Rep. 798.

24. CREDITORS' BILL—Assignment.—Certain insolvent debtors executed an assignment for the equal benefit of all their creditors to one who accepted the trust and took possession of the property, but afterwards repudiated the trust, and converted part of the property. A number of creditors then filed a bill, and prosecuted the suit to a decree which established the validity of the assignment, directed the assignee to account for all property converted, and ordered its distribution among the plaintiff creditors. This decree was affirmed on appeal, and, after the mandate was filed in the lower court, a judgment creditor who had not joined in the creditors' suit filed his petition of intervention therein: Held, that he was entitled to intervene and share in the assigned fund, for the only equity acquired by the suing creditors over one who did not join with them is one to require him to pay his proportionate part of the costs and disbursements.—MARTIN V. RAINWATER, U. S. C. C. of App., 56 Fed. Rep. 7.

25. CRIMINAL EVIDENCE — Bribery — Confession —A conviction for an attempt to bribe an attorney at law employed by private persons to prosecute for a theft is

not established by the confession of defendant that he offered the attorney money, at the request of the prosecuting witness to dismiss the prosecution; the attorney being dead and the confession uncorroborated.—BRADY V. STATE, Tex., 22 S. W. Rep. 924.

26. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—On an issue as to the admissibility of statements by deceased as dying declarations, the physician who attended deceased testified that he saw that the wound was fatal, and said to a third person, in the hearing of deceased, that "all the shot had gone to the hollow," on which remark deceased made no comment. Another witness testified to a conversation with deceased on the day of his death, in which the latter did not state who shot him, or what he expected to be the result of the injuries, and made no statement as to how he felt, except that "he was not suffering so much:" Held, that it did not appear that the statements of deceased were made under a sense of impending death.—BLACKBURN V. STATE, Ala., 13 South. Rep. 274.

27. CRIMINAL EVIDENCE—Larceny—Photograph.—On a trial for larceny a witness testified that at the time of the commission of the crime defendant had side whiskers and a mustache, while certain witnesses for defendant testified that they had known defendant since the spring of 1887, and that he had never worn side whiskers: Held, that it was proper to admit in evidence a photograph of defendant to show that when it was taken, in July, 1887, he wore side whiskers.—COMMONWEALTH V. MORGAN, Mass., 34 N. E. Rep. 458.

28. CRIMINAL EVIDENCE — Rape.—The theory of the prosecution on a trial for rape, was that the prosecuting witness and E, another girl, attended a dance together, where they met defendant and one A; that the girls permitted them to take them home in a buggy, but instead of going home they started in another direction; that E jumped from the buggy and escaped, but the prosecuting witness was forcibly taken to a secluded spot, and subjected to sexual intercourse by both young men, under threats of personal violence. The defense was that the intercourse was voluntary: Held, that evidence of E that the last she knew of the prosecuting witness after jumping from the buggy she was "hollering" for help was admissible as part of the *res gestæ*.—PEOPLE V. FLYNN, Mich., 55 N. W. Rep. 834.

29. CRIMINAL LAW—Assault—Indictment Variance.—Pen. Code, art. 501, provides that a "bowie knife," as the term is used in the Code, means any knife intended to be worn upon the person, which is capable of inflicting death, and not commonly known as a "pocket-knife:" Held, where an indictment charged an assault with intent to murder with a bowie knife, and the evidence showed an assault with a butcher knife, that there was no variance.—HERNANDEZ V. STATE, Tex., 22 S. W. Rep. 972.

30. CRIMINAL LAW—Forgery.—Defendant and one H were charged with forging the name of one K to a note. Defendant was the brother-in-law, and H the brother, of K. On the trial it appeared that K was willing that his name should be so used, but the State claimed that he was to be notified when his assistance was needed, while defendant claimed that he was to be notified when his name was actually used: Held, that defendant was not guilty of forgery.—MCCAY V. STATE, Tex., 22 S. W. Rep. 974.

31. CRIMINAL LAW — Homicide — Self-defense.—On a trial for murder the jury was instructed that, if defendant voluntarily provoked the difficulty which resulted in the death of deceased by defendant, "then the jury cannot acquit defendant on the ground of self-defense; and this is true although, at the time defendant fired the shot that resulted in the death of deceased, he was pursued by deceased, and was hard pressed, and endeavoring to get away from deceased, and to abandon the combat:" Held, erroneous.—STATE V. CABLE, Mo., 22 S. W. Rep. 953.

32. CRIMINAL LAW — Larceny—Husband and Wife.—Since Act Feb. 28, 1887 (Code, § 2341), gives a wife separate ownership of property, an indictment for larceny of a wife's properly must allege ownership in her, rather than in her husband.—ROLLINS V. STATE, Ala., 13 South. Rep. 280.

33. CRIMINAL LAW—Misconduct of Jury.—Code Crim. Proc. art. 777, subd. 7, provides that "a new trial shall be granted when the jury, after being retired to deliberate on the case, have received their testimony:" Held, that where a juror, while considering a verdict, related conversations about the case which were not in evidence, and stated that he knew enough to satisfy him "that defendant ought to be hung," a new trial should be granted, whether the verdict was influenced by such juror or not.—MCWILLIAMS V. STATE, Tex., 22 S. W. Rep. 970.

34. CRIMINAL LAW—Slander—Privileged Communications.—Statements which would otherwise be slanderous are privileged when made to the father of the person alleged to have been slandered, after having been pressed by him to speak.—DAVIS V. STATE, Tex., 22 S. W. Rep. 979.

35. CRIMINAL PRACTICE—Assault with Intent to Commit Murder.—Since Rev. St. 1881, § 1746, provides that an indictment for murder in the second degree need not set forth the manner in which or the means by which death was caused, an indictment for an assault with intent to commit murder in the second degree need not set forth the manner or means.—BAKER V. STATE, Ind., 34 N. E. Rep. 441.

36. CRIMINAL PRACTICE—Larceny.—An indictment for larceny, which describes the property alleged to have been stolen as "two ladies' walking jackets," and lays the ownership in "W. L. Connevey & Co.," without stating the names of the firm, and without furthur description of the property, is sufficient.—MCCOWAN V. STATE, Ark., 22 S. W. Rep. 955.

37. CRIMINAL PRACTICE—Rape.—Rev. St. 1891, ch. 38, § 237, declares: "Rape is the carnal knowledge of a female, forcibly and against her will. Every male person of the age of 16 years and upward, who shall have carnal knowledge of any female person under the age of 14 years, either with or without her consent, shall be adjudged guilty of the crime of rape: provided, that every male person of the age of 14 years and upward, who shall have carnal knowledge of a female, forcibly and against her will, shall be guilty of the crime of rape:" Held, that an allegation in an indictment for rape that the accused was "of the age of 14 years and upward" was surplusage, and need not be proved, since the *proviso* in the statute applied only to the sentence immediately preceding it. — SUTTON V. PEOPLE, Ill., 34 N. E. Rep. 420.

38. CRIMINAL TRIAL—Competency of Juror.—A juror who states that he has found an opinion as to the guilt of the accused, from talking with a witness for the State, but that he can disregard that opinion, and render a verdict in accordance with the law and the testimony adduced on the trial, is a competent juror.—STATE V. COVINGTON, La., 13 South. Rep. 266.

39. DEED — Construction.—Where a deed was to a husband and wife "in joint tenancy, and to the survivor of them," a provision that "in case of the death of" the wife, "her children are to inherit her interest," presupposes that the husband will die before the wife.—BARDEN V. OVERMEYER, Ind., 34 N. E. Rep. 439.

40. DEED — Limiting Estate.—A deed conveyed two adjoining tracts of land, and immediately following the description of the last tract contained the words "for a road to and from said premises first above described:" Held, that these words of themselves, were not sufficient either to limit the grant of the second tract to an easement, or to create a condition subsequent.—SOUKUP V. TOPKA, Minn., 55 N. W. Rep. 825.

41. DEED — Warranty—After-acquired Title.—Where the grantor in a warranty deed of lots, of which the grantee is not put in actual possession, acquired title to the lots after the execution of the deed, and before

the grantee attempts to rescind the entire sale; the latter is not entitled, in an action on the covenant of seisin, to recover the entire purchase money, with interest, since defendant's after-acquired title enures to plaintiff's benefit, and as to such lots he is only entitled to nominal damages, especially where, after the grantee has knowledge of the state of the title to each lot, it is arranged between him and the grantor that his title thereto should be perfected.—McLENNAN v. PRENTICE, Wis., 55 N. W. Rep. 764.

42. DIVORCE—Alimony and Costs.—Under a judgment in a divorce proceeding, requiring "all costs, expenses, and disbursements provided for and contemplated in the decree or judgment to be paid by the plaintiff exclusively out of his separate property, defendant has no right to include in her cost bills items not taxable as costs.—WHITE v. WHITE, Cal., 34 N. E. Rep. 399.

43. EASEMENT — Way of Necessity.—Defendant's lot was bounded on the north by A street and on the west by a park, west of which was B street. She conveyed the rear end of the lot to plaintiff, who purchased, with defendant's knowledge, for the purpose of building a residence thereon. Defendant's deed to plaintiff called for B street as the westerly boundary of the lot conveyed; but the measurement and calls limited the westerly boundary to the park, and the city, which owned the park, denied plaintiff access across it to B street by carriage. Plaintiff's lot was inclosed on other sides by the lands of others: Held, that plaintiff was entitled to a carriage way across defendant's land to the street; and that, notwithstanding a footway along the easterly edge of the park to A street.—CAMP v. WHITMAN, N. J., 26 Atl. Rep. 917.

44. EJECTMENT—Outstanding Title.—In ejectment by the purchaser under foreclosure of a trust deed, a prior deed in the execution of the same trust, which is regular on its face, and was recorded prior to the purchase by plaintiff, is a sufficient outstanding title to defeat plaintiff's recovery, though such prior deed might, in a court of equity, be held void, because the sale under which it was given was not made "at the court-house door," as provided in the trust deed.—SCHANAWERK v. HOBRECHT, Mo., 22 S. W. Rep. 949.

45. EQUITABLE ASSIGNMENT OF AMOUNT DUE CREDITOR.—An order drawn by a creditor upon funds in the hands of his debtor, and not accepted by the debtor, is an equitable assignment of the funds in the hands of the debtor to the amount of said order, and can only be enforced in a court of equity.—BRADLEY & CURRIER CO. v. BERNZ, N. J., 26 Atl. Rep. 908.

46. EQUITY PRACTICE—Corporations—Decree.—A bill of review which sets out in full the original bill, the summons issued thereon, the returns indorsed on the summons, the entry of defendant's appearance, the orders of default and reference, the master's report, and depositions thereto attached, and the final decree based on such report, is sufficient even though it does not set out in full certain exhibits referred to in the master's report, since it is not necessary to set out in a bill of review the evidence on which the decree was rendered.—BRUSCHKE v. DER NORD CHICAGO SCHEUTZEN VEREIN, Ill., 34 N. E. Rep. 417.

47. ESTOPPEL.—The mere fact that the owner of property has intrusted the possession of it to another will not estop him from asserting his ownership against one who purchases from the bailee in the belief that such bailee was the owner.—BAKER v. TAYLOR, Minn., 55 N. W. Rep. 823.

48. FALSE IMPRISONMENT—Justification by Officer.—In an action for false imprisonment it appeared that a newspaper article stated that plaintiff and some companions boarded a street car, when drunk, and refused to pay their fare; that the conductor and motorman attempted to put them off, when a fight ensued, and a lady passenger became frightened, jumped from the car, and was injured: Held, that there was nothing in the article to justify an arrest without a warrant on the ground that a felony had been committed under How. St. §§ 9274, 9275, which make it criminal willfully and maliciously by act or intimidation to impede or obstruct the regular operation of a railroad.—WHITE v. MCQUEEN, Mich., 55 N. W. Rep. 843.

49. FEDERAL COURTS—Cherokee Nation—Judgments.—The proceedings and judgments of the courts of the Cherokee Nation in cases within their jurisdiction are on the same footing with those of the courts of the territories of the Union, and entitled to the same faith and credit; and hence, where a party in a federal court justifies an entry under such writ of ejectment, the sufficiency of the evidence before the clerk to justify its issuance cannot be inquired into.—MEHLIN v. ICE, U. S. C. C. of App., 56 Fed. Rep. 12.

50. FORCIBLE DETAINER—Assignee of Landlord.—Under Rev. St. 1891, ch. 57, § 2, which provides that an action of forcible entry and detainer may be brought "when a peaceable entry is made, and the possession unlawfully withheld," such action may be brought by a landlord against one who, under a distinct claim of title, and without collusion with the tenant, obtains peaceable possession of the demised premises during the continuance of the term, and retains such possession after the lease has been terminated and a demand of possession has been made on him by the landlord.—THOMASSON v. WILSON, Ill., 34 N. E. Rep. 432.

51. FRAUDULENT CONVEYANCES BY CORPORATIONS.—A mortgage by a corporation is fraudulent as to creditors where part of the amount secured thereby is a loan to one of its officers, and it is immaterial that the officer applied the money loaned to the payment of his indebtedness to the corporation, or that part of the amount secured was a *bona fide* indebtedness of the corporation.—NATIONAL TUBE-WORKS CO. v. RING REFRIGERATING & ICE MACH. CO., Mo., 22 S. W. Rep. 947.

52. FRAUDULENT CONVEYANCES—Rights of Creditors.—Creditors of a person defrauded have no right to complain of the fraud, though its effect is to diminish the debtor's means of paying them.—PARKER v. ROBERTS, Mo., 22 S. W. Rep. 914.

53. GUARANTY—Weight of Cotton.—The consignor of cotton caused it to be weighed by local weighers, and, when he had procured bills of lading from the carrier, drew on the consignee, in favor of defendants, who had made advances on the cotton. Defendants forwarded the draft for collection, with the bill of lading and the weigher's certificate attached; but the consignee refused to honor the draft unless defendants would "guaranty weight differences, if any," whereupon defendants telegraphed the consignee, "We guaranty weights" of the cotton shipped: Held, that defendants did not guaranty that there should be the specified weight of merchantable cotton, but only that the entire amount shipped should be of the weight given at the place of shipment.—BORNEFIELD v. WETTERMARK, Tex., 22 S. W. Rep. 997.

54. HUSBAND AND WIFE—Wife's Separate Estate.—A personal judgment against a married woman for family expenses, for which she is rendered personally liable by Rev. St. 1891, ch. 68, § 15, may be enforced by seizure of property acquired by her while the married women's act of 1891, which exempted the separate property of married women from execution for the debts of their husbands, was in force.—MYERS v. FIELD, Ill., 34 N. E. Rep. 424.

55. INTEREST—Method of Computation.—In an action for a balance due on an account current it is error to compute interest with monthly rests when there is no evidence to justify such manner of computing.—JONES v. GALLIGHER, Utah, 33 Pac. Rep. 417.

56. INTOXICATING LIQUORS—Information—Sufficiency of Verification.—An information charging the defendant with violations of the prohibitory liquor law, verified positively by the county attorney, is sufficient, where his information as to the offenses charged is based on the testimony of witnesses subpœnæd and examined under the provisions of paragraph 2543 of the General Statutes of 1889, without filing the sworn statements of witnesses.—STATE v. HUFFMAN, Kan., 33 Pac. Rep. 377.

57. INTOXICATING LIQUORS — License.—One who traffics in spirituous, vinous, malt, or intoxicating liquors, at a regular place of business, and pays the assessment of $250 therefor, as required by section 8092, subd. 8, Rev. St., known as the "Dow Law," has the right to store all or a part of his liquors in a cooler or building separate and apart from his regular place of business, without paying a second assessment on account of such cooler or building, provided no purchases or sales of such liquors be made at such building or cooler.—HANSON v. LUCE, Ohio, 34 N. E. Rep. 435.

58. JUDGMENT—Action on by Assignee.—The amendment of the practice act, approved March 4, 1890 (P. L. 1890, p. 24), does not authorize a person to whom a judgment had previously been assigned to bring suit upon the judgment in his own name. — LYDECKER v. BABCOCK, N. J., 26 Atl. Rep. 925.

59. JUDGMENT AGAINST CORPORATION — Service. — A simple recital, in the entry of a judgment against a corporation by default, that services on L, as secretary and treasurer of defendant, was proved, fails to show that proof was made to the court that the person on whom the process was served was, at the time of service, authorized to receive it on behalf of defendant.—OXANNA BLDG. ASS'N v. AGEE, Ala., 13 South. Rep. 279.

60. JUDGMENT—Justice—Filing Transcript.—How. St. § 6949, provides that, when a transcript of a judgment recovered before a justice of the peace is filed in the circuit or district court, it shall have the same effect as a judgment rendered therein, and may in the same manner be enforced, discharged, and canceled, and that execution may be issued thereon in the same manner as if execution were to be issued by the justice; and section 6993 provides that, after filing and docketing such transcript, all executions shall be issued out of the circuit or district court, and the power of the justice in respect to such judgment shall cease: Held, that the filing of such transcript divests the justice of jurisdiction, and prevents the party against whom the judgment was entered from thereafter entering a stay with the justice.—HITCHCOCK v. HOSMER, Mich., 55 N. W. Rep. 841.

61. JUDGMENT — Recording Abstract. — Rev. St. art. 3154, requires the clerk of the court in which a judgment is rendered on application "to make out and deliver an abstract of such judgment, and certify thereto under his hand and official seal." Article 3157 requires the county clerk to record any such abstract, when presented for the purpose, in the judgment record: Held, that the record of the abstract of the judgment must contain also the clerk's certificate, in order to give a lien on the land as against subsequent purchasers.—SPENCE v. BROWN, Tex., 22 S. W. Rep. 983.

62. JUDGMENT—Vacating.—A motion to vacate or set aside a judgment under the provisions of section 4939, Comp. Laws, is addressed to the sound legal discretion of the trial court on the particular facts of the case, and its action in the matter, whether of allowance or refusal, will not generally be disturbed by the appellate court, unless there is a manifest abuse of such discretion.—EVANS v. FALL RIVER COUNTY, S. Dak., 55 N. W. Rep. 862.

63. LIMITATION OF ACTIONS. — An action by the ex-treasurer of a county, brought six years after his term of office expired, to recover commissions on bonds issued during his term of office, and delivered to a contractor, to pay for a court house for the county, is barred by limitation.—MCDONNEL v. CALLAHAN COUNTY, Tex., 22 S. W. Rep. 981.

64. MARRIED WOMAN—Separate Estate. — Under sections 4996, 5319, Rev. St. (Act March 20, 1884; 81 Ohio Laws, 65), the remedy against the separate estate of a married woman is the same as if she were unmarried. —CARD FABRIQUE CO. v. STANAGE, Ohio, 34 N. E. Rep. 410.

65. MASTER AND SERVANT—Injury — Defective Pleading.—A petition in an action to recover for personal injuries, alleging that plaintiff, a brakeman in the employ of defendant railroad company, went between an engine and car to make a coupling; that the appliances on the engine were defective, and the road-bed rough, and that in making the coupling plaintiff's knee and foot were caught and mashed, causing the injuries complained of: Held, demurrable for failure to state facts constituting a cause of action, since it does not show, either directly or inferentially, that the defects in the road-bed or in the appliances for couplings were the proximate cause of the injury.—TEXAS & P. RY. CO. v. MCCOY, Tex., 22 S. W. Rep. 926.

66. MECHANIC'S LIEN.—Persons, who furnished materials for the entire building, supposing it to belong to B and S, and who, in making claim against B and S, inadvertently included material used by a coowner, should be allowed to correct the mistake. — WHITTIER v. STETSON & POST MILL CO., Wash., 33 Pac. Rep. 393.

67. MECHANIC'S LIEN—Notice — Repeal of Law.—Act March 6, 1883, § 5, providing for notice by a materialman or a mechanic to an owner at or before furnishing materials to a contractor, or performing labor for him, is not repealed, by implication, by Act March 9, 1889.—SPECTER v. KIMBELL & COBB STONE CO., Ind., 34 N. E Rep. 452.

68. MINING CLAIMS — Annual Assessment Work. — Where all the work claimed as the annual assessment work on a mining claim is done outside of the exterior lines of such claim, the burden of proof is on the persons doing such work to show that it inured to the benefit of such claim, so as to prevent a forfeiture, and not on a person claiming under a junior location to show the contrary.—HALL v. KEARNY, Colo., 33 Pac. Rep. 373.

69. MINES AND MINING—Intersecting Veins.—Rev. St. U. S. § 2322, gives to the owner of a mining location all veins, lodes, or ledges, throughout their depth, the tops or apexes of which lie inside the surface lines of the senior location. Section 2336 provides that where two or more veins intersect or cross each other the prior location is entitled to all ore within the space of intersection, but the subsequent locator shall have the right of way through the space of intersection: Held, that if a lode on a junior location intersects, on its strike, within the boundaries of a senior location, a lode on the senior location, the latter act did not give to the junior locator the right to take all the ore in the first-mentioned lode within the boundaries of both the senior or junior location except at the space of intersection, and hence such act did not conflict with section 2322,—an earlier act,—so as partially to repeal it.—WATERVALE MIN. CO. v. LEACH, Ariz., 33 Pac. Rep. 418.

70. MORTGAGE — Foreclosure. — For the purpose of foreclosing a mortgage of real estate under the power, the notice of sale must be signed with the names of all who appear, of record, to own the mortgage; and if, after the first, and before the last, publication of notice, there is put on record an assignment of a part interest in the mortgage to one whose name is not signed to the notice, a sale pursuant to notice so published will be invalid.—DUNNING v. MCDONALD, Minn., 55 N. W. Rep. 864.

71. MORTGAGE—Foreclosure—Decree.—Where a decree for the sale of the property of a corporation to satisfy a mortgage expressly provides that creditors claiming to have prior rights to the property may present their claims to the court for adjudication before distribution of the proceeds of the sale, such creditors have no right to complain of the decree.—CENTRAL TRUST CO. v. UNITED STATES ROLLING-STOCK CO., U. S. C. C. (Ill.), 56 Fed. Rep. 5.

72. MORTGAGES — Priority. — Where a mortgage first in date and registry embraces a mere privilege to buy certain land, described in the mortgage, for a specified price, but neither the mortgagor nor mortgagee pays the purchase money, but the same is paid by the grantee of the land, who succeeded to the mortgagor's privilege of purchase, out of money loaned to him on

the security of the land, the privilege covered by the mortgage first in date ceased to exist when the land was conveyed to, and paid for by, another person than the person who executed the mortgage first in date.—HALSTED'S EX'RS v. COLVIN, N. J., 26 Atl. Rep. 928.

73. MORTGAGES — Setting up Independent Claim.—A mortgagor cannot redeem his mortgage by setting up any independent personal demand against the mortgagee.—BROWN v. CORIELL, N. J., 26 Atl. Rep. 914.

74. MUNICIPAL CORPORATION—Defective Sidewalks.—Where a cellar way, trapdoor, scuttle, or the like is put in a public sidewalk for the convenience of the abutting property, as between the owner and the city, the duty of maintaining it in a safe condition devolves upon the former, and he cannot release himself of this duty by merely abandoning the use of the structure. He can only do so by removing it and restoring the sidewalk to its original condition.—CITY OF WABASHA v. SOUTHWORTH, Minn., 55 N. W. Rep. 818.

75. MUNICIPAL CORPORATION — Defective Streets. — Defendant's building abutted on a public street. Before it was an area way extending somewhat into the street, and constructed for the purpose of lighting defendant's cellar, but whether by a former owner of the building, or by the city under a mistaken belief as to the location of the boundary between the street and defendant's land, did not appear. The area was not on defendant's land: Held, that the city could not maintain an action against defendant for damages which it had been obliged to pay to one who had fallen into the area.—CITY OF LOWELL v. GLIDDEN, Mass., 35 N. E. Rep. 459.

76. MUNICIPAL CORPORATION—Intoxicating Liquors—License.—The Grand Rapids city charter gives the common council power "to enact such ordinances, by-laws, and regulations as they deem desirable, to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof," and that no person shall engage in such occupation, within the city limits, without a license: Held, that the charter authorized an ordinance requiring an application for a license to be made to the common council, and prescribing the conditions precedent to its consideration by the council, and conferred on the council power to determine each individual application as far as the location and suitableness of the saloon were concerned.—SHERLOCK v. STUART, Mich., 55 N. W. Rep. 845.

77. MUNICIPAL CORPORATIONS—Contractors' Bonds.—That part of Sess. Laws 1891, ch. 55, § 15, which authorizes any person who has not been paid for labor performed or for materials furnished to a contractor with the city, to bring a suit in his own name against said contractor and his bondsmen, applies to actions brought to enforce a liability upon a bond executed under the provisions of the original charter.—TOMPKINS v. FORRESTAL, Minn., 55 N. W. Rep. 813.

78. MUNICIPAL CORPORATIONS — License.—A permit given by a city to a lot owner to construct, maintain, and use a vault under the alley in rear of his lot, and a bond given by him, conditioned upon his saving the city harmless from loss on account of such vault, and keeping the alley above it in good repair, constitute a contract, irrevocable by the city, so long as its revocation is not demanded by the public interest or convenience.—GREGSTEN v. CITY OF CHICAGO, Ill., 34 N. E. Rep. 426.

79. MUNICIPAL CORPORATIONS—Obstruction in Street—Notice.—The presence for three days of a heap of brush two feet high, and occupying eight feet of ground, in a principal street of a town, within one and a half blocks from the court-house, and within about one block of the business center, imposes upon the town the duty of ascertaining its presence.—TOWN OF MONTICELLO v. KENARD, Ind., 34 N. E. Rep. 454.

80. MUNICIPAL CORPORATIONS—Street Improvements.—Charter City of Seattle 1886, § 7, authorizes the city to provide for street improvements, and to levy a general tax to pay therefor; and provide that all such improvements shall be paid for out of the fund arising from such tax. Section 8 authorizes similar improvements, and the levy and collection of special taxes or assessments on abutting property to pay therefor. Section 10 authorizes the city council to prescribe by ordinance the method of assessing and collecting such taxes. Ordinance No. 737, § 2, provides that the method shall be by special assessment. Section 8 provides that when an assessment is ordered paid to a contractor a duplicate of the roll shall be delivered to him, so that he may collect or foreclose in accordance with the statute: Held, that a contractor, who received warrants of the city for such improvements, or his assignee, was not entitled to have them paid from the general or street fund, but is limited to payment from special assessments.—SOULE v. CITY OF SEATTLE, Wash., 33 Pac. Rep. 384.

81. NEGLIGENCE.—A complaint which alleged that defendant negligently ran its train filled with oil over its track, which was defective, and at a rate of speed forbidden by ordinance, and that the train was wrecked thereby, and the oil flowed onto plaintiff's premises and caught fire, and destroyed her property, states a cause of action against defendant.—LAKE ERIE & W. R. CO. v. LOWDER, Ind., 34 N. E. Rep. 447.

82. NEGLIGENCE—Sale of Spoiled Meat—Evidence.—In an action against a company for selling a piece of spoiled bacon, which made plaintiff sick, it was error not to permit one of defendant's employees to answer whether he knew of any spoiled "meats" that were sold by defendant about the time of plaintiff's purchase.—CRAFT v. PARKER, WEBB & CO., Mich., 55 N. W. Rep. 812.

83. NEGLIGENCE—Telephone Company—Injuries from Charged Wire.—Where a telephone company has permission from an electric light company to string its wires along the latter's poles when the telephone company wishes to connect a residence where it has no poles, and the telephone company disconnects a residence, and, instead of removing the wire, coils it up, and hangs it on an electric light pole, the telephone company is bound to look after the wire; and if it fail to do so, and the electric light company remove the pole, and hang the wire on a telephone pole, where it becomes charged with electricity from an electric light wire, and injures a pedestrian on the sidewalk, the negligence of the telephone company is the proximate cause of the accident.—AHERN v. OREGON TELEPHONE & TELEGRAPH CO., Oreg., 33 Pac. Rep. 408.

84. NEGOTIABLE INSTRUMENT—Interest.—A note made payable with interest, without specifying the rate, or the time from which the interest is to be computed, carries interest from the date of its execution at the legal rate fixed by law; and a note containing the words, "with the interest at the rate of one and one-quarter," but nothing more to indicate the rate, is governed by the same rule.—SALAZAR v. TAYLOR, Colo., 33 Pac. Rep. 369.

85. NEGOTIABLE INSTRUMENT—Note Given on Sunday.—A note executed and delivered in Michigan on Sunday, in payment of goods sold and delivered there, though payable in Ohio, where the vendors live, is governed by the laws of Michigan, and is void, under How. St. § 2015.—ARBUCKLE v. REAUME, Mich., 55 N. W. Rep. 808.

86. NEGOTIABLE INSTRUMENTS — Transfer after Maturity—Equities.—A *bona fide* purchaser, for value, of an overdue negotiable instrument, holds it subject only to such equities as attach to the instrument itself at the time of the transfer, and not to offsets before or after acquired, of which he has no notice.—DAVIS v. NOLL, W. Va., 17 S. E. Rep. 791.

87. NEW TRIAL.—A motion for a new trial, in a case of equitable jurisdiction, because the issues were submitted to a jury, is premature when made after the return of a general verdict by the jury, but before the court has made its findings in the case.—GARARD v. GARARD, Ind., 34 N. E. Rep. 442.

88. OFFICE AND OFFICERS—Impeachment of State

Officer.—The constitution of this State confers the sole power of impeachment upon the senate and house of representatives, in joint convention, and the legislature cannot delegate that power to others.—STATE v. LEESE, Neb., 55 N. W. Rep. 798.

89. OFFICE AND OFFICER — State Officer — Impeachment.—The power of impeachment conferred by the constitution upon the legislature extends only to civil officers of the State, and this power cannot be exercised after the person has gone out of office.—STATE v. HILL, Neb., 55 N. W. Rep. 794.

90. PARTNERSHIP—Dissolution.—On dissolving a partnership the court should not decree that plaintiff recover of defendants an amount equal to his proportion of the assets remaining after paying liabilities, less an amount he had received, where defendants have not converted the whole of the assets into cash; but he should have a decree for his proportion of the amount left after paying liabilities out of the assets actually collected, less the amount paid him, and for his share of the remaining assets when converted into money.—DURKHEIMER v. HEILNER, Oreg., 33 Pac. Rep. 401.

91. PARTNERSHIP PROPERTY — Chattel Mortgage.—Plaintiff, by written agreement, leased a farm for one year to M, furnished him with certain stock, and agreed to let him have all the hay and feed on the place, in consideration of M's agreement to feed and winter the stock. It was further agreed that either party might put additional stock on the farm, and that after the sale of the stock, in the fall, each party was to be credited with what he had paid for stock, and the balance of the proceeds divided between them: Held, that the property contributed to the joint enterprise, and accumulated in the prosecution of it, was joint property.—STRONG v. HOSKIN, Wis., 55 N. W. Rep. 552.

92. PLEADING.—An admission in the original answer is not conclusive on defendant, where he has filed an amended answer which does not contain such admission.—BAXTER v. NEW YORK, T. & M. RY. CO., Tex., 22 S. W. Rep. 1002.

93. PROHIBITION — To Town Council.—The supreme court is without jurisdiction to issue a writ of prohibition to a town council, commanding it not to issue bonds, the writ being issuable, under Const. art. 4, § 4, to courts only.—HUNTER v. MOORE, S. Car., 17 S. E. Rep. 797.

94. PUBLICATION OF LEGAL NOTICE.—Under Rev. St. 1891, ch. 100, § 1, which declares that publication of legal notices in newspapers may be proved by the certificate of the publisher stating the number of times the same had been published, and giving the dates of the first and last papers containing the notice, a certificate stating that a notice "has been published five successive days in the Chicago Mail, a daily newspaper," sufficiently states the number of times the notice was published.—MCCHESNEY v. PEOPLE, Ill., 34 N. E. Rep. 431.

95. RAILROAD COMPANY—Contributory Negligence of Child.—A child familiar with a railroad crossing, and in the habit of crossing it four times a day, and who is not shown to have had any occasion for haste, is guilty of contributory negligence in attempting to cross while the gates are down; and it is immaterial that a switching engine is standing near by, not in motion, for, several tracks being inclosed, she is not justified in supposing that the gates are down on account of such engine.—MARDEN v. BOSTON & A. R. CO., Mass., 34 N. E. Rep. 404.

96. RAILROAD COMPANY — Elevated Railroad.—In an action for damage to the fee in plaintiff's property, arising from the construction of an elevated railroad, the fact that the court erroneously refused to find as a fact that the value of the easements taken, when considered alone, was only nominal and that the damages to be recovered, if any, were consequential only, is not a ground for reversal, where the record shows, beyond any fair doubt, that the court adopted the true rule of damages, and considered the benefits, if any, arising from the construction of the railroad.—SIXTH AVE. R. CO. v. METROPOLITAN EL. RY. CO., N. Y., 34 N. E. Rep. 400.

97. RAILROAD COMPANY — Killing Live Stock — Damages.—In an action against a railroad company for the alleged killing of plaintiff's bull, evidence of the blood and excellence of the sire and dam of the anima killed are admissible, but cannot fix its market value.—RICHMOND & D. R. CO. v. CHANDLER, Miss., 13 South. Rep. 267.

98. RAILROAD COMPANY—Obstruction of Highway.—Where a railroad company, under a city ordinance, or the statute, constructs and operates its road in a street or highway, but leaves sufficient space between the road-bed and abutting land or lots for ordinary vehicles, teams, and travel, there is no such obstruction of access to abutting land or lots as to permit damages for any depreciation in value thereof.—CHICAGO, K. & W. R. CO. v. UNION INV. CO., Kan., 33 Pac Rep. 378.

99. RAILROAD COMPANY — Stock Killing — Failure to Fence.—Act March 13, 1890 (Sess. Laws 1890, p. 78), which renders railroad companies liable for injuries to stock unless they fence their roads and construct sufficient cattle-guards where such roads pass through lands "owned and settled or occupied by private owners," requires such fencing and construction of guards where the land in the vicinity of the place where a horse is killed is settled upon, owned, and occupied by farmers, and forms a portion of tracts which are under cultivation, though not itself cultivated.—STIMPSON v. UNION PAC. RY. CO., Utah, 33 Pac. Rep. 369.

100. RAILROAD COMPANIES—Accidents at Crossings—Failure to Signal.—In an action against a railroad company for the wrongful death of plaintiff's intestate at a public highway crossing, the burden of proving that defendant did not ring the bell continuously, or alternately with the sounding of the whistle, for 80 rods from, and until the train has passed, the crossing as required by statute, is upon plaintiff.—HUBBARD v. BOSTON & A. R. CO., Mass., 34 N. E. Rep. 459.

101. RAILROAD COMPANIES—Negligence.—In an action against a railroad company for the death of plaintiff's husband, who stepped at night in front of an engine having a bright headlight, near defendant's depot, while the train was running at a high rate of speed, it is not error to charge that "the running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such trains;" since such charge means no more than that it is not negligence *per se* to run a train at any particular rate of speed.—MCDONALD v. INTERNATIONAL & G. N. RY. CO., Tex., 22 S. W. Rep. 939.

102. RAILROAD COMPANIES—Use of Tracks.—A railroad company entered into an agreement with a city to lay its track in and through a portion of said city, and agreed to permit any other railroad terminating in the city to use the track, paying a *pro rata* share of the cost: Held, that under the agreement all railroads which have a terminus in said city, without regard to whether they are operating under foreign or domestic charters, are entitled to use the track.—LOUISVILLE & N. R. CO. v. MISSISSIPPI & T. R. CO., Tenn., 22 S. W. Rep. 920.

103. RELEASE BY INCOMPETENT.—A person who has sustained injuries through another's negligence is not barred from suing therefor by accepting money in satisfaction of his claim for such injuries, and signing a release, where he was *non compos mentis* at the time he signed it.—TEXAS PAC. RY. CO. v. CROW, Tex., 22 S. W. Rep. 928.

104. RES JUDICATA—Foreclosure.—Where a mortgagee assigns the note and mortgage for the purpose of having the mortgaged foreclosed by his assignee, and regains title thereto after a decree has been rendered against his assignee in the foreclosure suit, such decree is conclusive against him as to all matters that were or that might have been litigated therein.—CHENEY v. PATTON, Ill., 34 N. E. Rep. 416.

105. SALE—Title—Delivery to Carrier.—Under a valid contract for the manufacture and sale of goods, with instructions by the purchaser to vendor to send them to the purchaser, the delivery of the goods to a common carrier to be forwarded is a delivery to the purchaser, and the title passes to the purchaser, subject to the vendor's right of stoppage *in transitu*.—KELSEA V. RAMSEY & GORE MANUF'G CO., N. J., 26 Atl. Rep. 907.

106. SCHOOL BOARD — Resignation of Member.—Relator, a member of a school board, tendered his resignation to the president of the board, was nominated for alderman, and was present at a caucus at which one M was nominated to fill the vacancy caused by his resignation. One C was also nominated for the same office. Relator was defeated as alderman, and C was elected, and so declared by the common council. Relator then attempted to withdraw his resignation: Held, that relator is in no position to claim a seat in the board, though the resignation from such office should have been tendered to the common council.—PARSIEAU V. BOARD OF EDUCATION, Mich., 55 N. W. Rep. 899.

107. SCHOOLS — Compulsory Attendance.—Acts 1890, ch. 384, provides that a person having under his control a child between the age of 8 and 14 years, and neglecting to cause the same to attend the public day school for at least 30 weeks during each school year, shall forfeit, etc., unless such child attended a private day school approved by the school committee, or "has been otherwise instructed for a like period of time in the branches of learning required by law to be taught in the public schools," or has already acquired such branches: Held, that on the trial of a parent for violation of such statute it was error to exclude evidence that during the time alleged in the complaint defendant's child had been instructed for the required time in the branches of learning taught in the public schools in a private day school not approved by such school committee.—COMMONWEALTH V. ROBERTS, Mass., 34 N. E. Rep. 402.

108. SUPREME COURT — Submission of Questions by Legislature.—The supreme court is not authorized, in response to legislative inquiry, to pass upon the constitutionality of a statute already enacted.—IN RE UNIVERSITY FUND, Colo., 33 Pac. Rep. 415.

109. TAXATION — Money deposited in Bank. — Money deposited in a bank by a receiver is money on hand, and not a debt against the bank, and is liable to taxation.—CAMPBELL V. RIVIERE, Tex., 22 S. W. Rep. 993.

110. TAXATION OF CORPORATIONS — Assessment. — In determining the capital of a corporation for the purpose of general taxation, the true value of its corporate assets, less its debts, and not the market value of the shares, is to be considered.—PEOPLE V. WEMPLE, N. Y., 4 N. E. Rep. 386.

111. TELEGRAPH COMPANIES — Agreement Restricting Liability.—As a common carrier, a telegraph company cannot legally refuse to accept and transmit an offered message because the person offering will not sign an agreement that such carrier shall not be liable for damages in any case where the claim is not presented, in writing, within 60 days after the message is filed with the company for transmission. While such an agreement, when freely made, is binding, the carrier cannot exact it as a condition precedent to the discharge of his duty as such common carrier.—KIRBY V. WESTERN UNION TEL. CO., S. Dak., 55 N. W. Rep. 760.

112. TELEGRAPH COMPANIES—Damages.—In an action against a telegraph company for failure to deliver a message instructing the addressee to purchase for plaintiff 100 shares of certain stock, the mere facts that within a few days after the message was sent the price of such stock advanced $550, and so continued until suit was brought, does not entitle plaintiff to recover more than nominal damages, as there is no evidence that, if the stock had been purchased, plaintiff would have ever sold it at a profit.—WESTERN UNION TEL. CO. V. FELLNER, Ark., 22 S. W. Rep. 917.

113. TELEGRAPH COMPANIES—Notice of Relation.—A telegraph company is chargeable with notice of the relation that exists, if any, between all parties named in a message, and with notice of such purposes as may reasonably be inferred from the language used in connection with the subject-matter of the communication, taking into consideration the usual manner of expressing messages sent by such means. — WESTERN UNION TEL. CO. V. CARTER, Tex., 22 S. W. Rep. 961.

114. TRIAL—Examination of Witnesses. — A plaintiff may properly introduce evidence to refute an inference or presumption of fact that might arise from matters drawn from himself on cross-examination, even though such evidence has no direct bearing upon the issues, and the time of the introduction of such evidence is peculiarly within the discretion of the trial court.—BRANSTETTER V. MORGAN, N. Dak., 55 N. W. Rep. 758.

115. TRIAL—Failure to Call Witnesses. — In trespass for attaching goods, which plaintiff alleged and testified that he had bought from the attachment debtors, the fact that two members of the debtor firm were present as witnesses, but were not examined, cannot be considered by the jury as an unfavorable circumstance against plaintiff, since the witnesses were subject to the call of either party, and there was nothing to show that their testimony would have been other than cumulative. — HAYNES V. MCRAE, Ala., 13 South. Rep. 270.

116. VENDOR AND VENDEE — Contract — Mutuality.—Where a written contract for the sale and conveyance of real property provides that the deed shall be delivered at the time of making the first payment, the agreement to pay and the agreement to deliver are mutual and dependent agreements, and performance, or an offer to perform, by the purchaser, is necessary, to make it incumbent upon the seller to deliver the deed. Such is the general rule.—BAILEY V. LAY, Colo., 33 Pac. Rep. 407.

117. WATER COMPANIES — Powers — Use of Meters.—Though defendant water company's charter provided that all rates should be uniform for the same class of service, and that the charge for storehouse using one hydrant should be $9, the company is authorized, under a clause of the charter that the charge shall not exceed 5 cents per 100 gallons, in putting a meter on the pipe to plaintiff's building, containing apartments, stores, a boarding house, and a bank, and fixing a rate of 2½ cents per 100 gallons for the water passing through the meter.—EXCHANGE & BLDG. CO. V. ROANOKE GAS & WATER CO., Va., 17 S. E. Rep. 788.

118. WITNESS — Transactions with Decedents.—The term "party to the action," as used in Gen. St. 1878, ch. 75, § 8, means a party to the issue to which the testimony relates, and not merely a party to the record.—BOWERS V. SCHULER, Minn., 55 N. W. Rep. 817.

119. WRONGFUL ATTACHMENT—Action for Damages.—Where the owner of land is prevented from selling it by the wrongful levy of an attachment thereon, and such land depreciates in value during the time it is held under the levy, he may maintain an action for damages against the plaintiff in the attachment suit — WETSEL V. TILLMAN, Tex., 22 S. W. Rep. 980.